No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 595 F.2d 505.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A timely petition for rehearing

was denied on July 19, 1979 (App. B, *infra*, 17a-18a). On August 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a founded suspicion of criminal activity can be based on circumstantial evidence suggesting that a particular person or vehicle is involved in criminal activity or must be based on direct observation of inherently suspicious activity.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following jury trials in the United States District Court for the District of Arizona, respondents were convicted of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). Each respondent was sentenced to concurrent terms of five years' imprisonment on each of six counts. In addition, respondent Hernandez-Loera was fined $12,000.

1. The evidence at a pretrial suppression hearing showed that in early December 1976, Border Patrol officers patrolling a sparsely populated area of the Mexican border near Sells, Arizona, began investigating footprints indicating that on a number of occasions groups of from eight to 20 persons had walked north from the border across 30 miles of desert and mountains to an isolated area on Highway 86, an east-west highway in Arizona (S. Tr. 11-28, 56-70).[1] The officers found that the footprints followed a fairly well-defined path and that the groups travelled without resting (S. Tr. 17, 32). They noticed in particular that one recurring shoeprint was of a distinctive "chevron" design (S. Tr. 12-13, 56-57). The officers knew that the area through which the groups passed was heavily used by aliens illegally entering the country (S. Tr. 23), and they concluded that a person (whom they referred to as "Chevron") was guiding groups of aliens across the border and north to a place on Highway 86 (between mileposts 114 and 122) where they would be picked up by a vehicle (S. Tr. 68).

Analysis of the footprints and the times of their recurrence led the officers to a number of additional conclusions. First, they decided that the groups travelled at night, because the prints led into or over obstacles that would have been avoided in daylight (S. Tr. 15, 61). They also found that the tracks were made during clear weather and on or near week-

[1] "S. Tr." refers to the transcript of the suppression hearing.

ends (S. Tr. 54, 65-66, 73-74). In addition, the tracks around Highway 86 indicated that the aliens, when they reached the highway, would walk parallel to it for several miles in an eastward direction; typically, the tracks proceeded eastward some 50 to 75 yards away from the highway and then turned directly north to the highway and disappeared (S. Tr. 19-20, 41-42). From this the officers concluded that the groups had been picked up by a vehicle that probably approached them from the east, because it was unlikely that the aliens, after a long overland march, would walk along the highway away from the vehicle that was coming to meet them and be facing a direction from which they could not easily identify the oncoming pick-up vehicle. The officers also concluded that, after meeting the groups, the pick-up vehicle probably returned to the east, because it was unlikely that the aliens would be walking away from their ultimate destination (S. Tr. 68-69, 104-105).

On the evening of January 30, 1977, two officers who had been involved in the investigation of the chevron tracks decided to station themselves just off Highway 86 at a point approximately 30 miles east of the area where the Chevron-led groups had been picked up and to watch for a vehicle that might be used in the operation. The officers selected that night as a likely time for Chevron to lead another group to the highway because it was Sunday and the first clear night after a three-day period of rain

(S. Tr. 70, 147).[2] The officers assumed that if Chevron did decide to lead a group that night, he would not begin until after 6:00 p.m., when it got dark. Assuming that the group would cover between two and a half and three miles an hour travelling on foot, the officers calculated that it would take the group between eight and 12 hours to reach their pick-up point on Highway 86—*i.e.*, that they would be picked up between 2:00 and 6:00 a.m. on January 31 (S. Tr. 18, 73).

The officers decided to watch particularly for a camper, van, or similar vehicle that was capable of concealing a fairly large group and that passed them in a westward direction and returned eastward approximately one and a half hours later (S. Tr. 74). In their experience those were the types of vehicles most commonly used for smuggling sizeable groups of aliens,[3] and they calculated that it would take the pick-up vehicle an hour and a half after it passed them to drive to the estimated pick-up point and return (S. Tr. 74-76).

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[2] Tracks that had included the chevron print had been found and followed on two previous occasions that month, on January 4 and on January 16 (S. Tr. 58-69).

[3] The two officers involved had substantial border patrol experience. Each had been a Border Patrol officer working in this area for two and a half to three years, and both had substantial previous law enforcement experience (S. Tr. 55-56, 131-132). In addition, another officer who had participated in the investigation of the chevron tracks had been a Border Patrol officer for eight years and had considerable expertise in tracking (S. Tr. 3, 25).

During the early morning hours of January 31 the officers saw 15 to 20 vehicles pass them in a westward direction; only two of them—both pick-up trucks with camper shells—were of the kind that the agents considered likely to be used for smuggling (S. Tr. 76-77).[4] The first camper passed them at 4:30 a.m.[5] At 6:12 a.m. this vehicle passed them again in an eastward direction (S. Tr. 80). The officers followed the camper and confirmed from its license plate that it was the vehicle that had passed them going west at 4:30 a.m. (S. Tr. 81). They then turned on their emergency lights and pulled it over (*ibid.*). When the camper pulled over, respondent Cortez got out. As he approached the officers, one of them noticed the curtain on the rear window of the camper move. The officers identified themselves and told Cortez they were conducting an immigration check. They asked Cortez if there was anyone in the camper. Cortez stated that he had picked up some hitchhikers, and he proceeded to open the back of the camper (S. Tr. 82-84). After the officers established that the six persons in the back of the camper were aliens, the officers placed Cortez under arrest. The officers also arrested respondent Hernandez-Loera, who was sitting on the passenger

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[4] During the same period, the officers estimated that six to 10 vehicles passed them travelling in an eastward direction (S. Tr. 80).

[5] The second camper passed them 15 to 20 minutes later and did not, as far as the record shows, return (S. Tr. 78).

side of the camper. His shoes bore the distinctive chevron design on their soles (S. Tr. 85).

2. The district court denied the motion to suppress (S. Tr. 166). The court of appeals reversed, holding that the officers lacked reasonable suspicion justifying the stop of the camper (App. A, *infra*, 1a-8a).[6] The court explained its reasons as follows (*id.* at 6a-8a; emphasis in original):

> The founded suspicion test plainly requires balancing of the facts of the particular case, see [*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975)], and in such circumstances we will not find absolutely controlling precedent since the facts will differ. A case from our court which is quite closely related is *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).
>
> In that case, officers routinely stopped southbound vehicles in a "profile" class of automobile models thought likely to be stolen and transported from Phoenix or Tucson into Mexico. The "*profile*" was, we may say, constructed from specific, articulable facts. Nevertheless, we said: "Founded suspicion requires some reasonable ground *for singling out the person* stopped as one who was involved . . . in criminal activity" (emphasis added) (523 F.2d at 241). We pointed

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[6] Respondents' only claim on appeal was that the officers lacked reasonable suspicion justifying the initial stop. They did not contend that the subsequent discovery of the aliens and the arrest of respondents was unlawful even if the stop had been proper. Such a contention would be insubstantial in any event in view of the fact that respondent Cortez voluntarily opened the door to the camper, claiming that the occupants were hitchhikers (S. Tr. 82-84).

> out that Carrizoza-Gaxiola, himself, was doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle.
>
> The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped. * * *
>
> The officers did not have a valid basis for singling out the Cortez vehicle. They saw no one in the camper. They saw nothing suspicious about the vehicle itself. They had no specific information about illegal movement of aliens in that area that night. They observed no mechanical or equipment defects in connection with the vehicle. They observed no violation of traffic laws as in *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977). The sole suspicious fact connected with this specific vehicle was that it passed the officers' post headed west and returned headed east, both times in the pre-dawn hours. The passage of nearly two hours' time and the fact that the vehicle could have traveled to a small town and returned within that time, both furnish far too many innocent inferences to make the officers' suspicions reasonably warranted.

Judge Chambers dissented (App. A, *infra*, 8a-16a). After fully reviewing the facts, he concluded (*id.* at 15a-16a):

> *United States* v. *Brignoni-Ponce*, supra, recognizes the validity of permitting an officer "to assess the facts in light of his experience in de-

> tecting illegal entry and smuggling". In this case the officers, on the basis of their experience, put together a series of clues and concluded that there was a strong possibility that Chevron would bring a group of aliens across the border on this night and hour and place, and that he would be met by a vehicle of this sort, traveling in this direction. The clues, as they analyzed them, were absolutely correct in each detail. I fail to see that suspicion, based on this sort of skillful police analysis, can be called "unfounded" within the test of *Brignoni-Ponce*. I therefore dissent.

REASONS FOR GRANTING THE PETITION

We submit that the court of appeals in this case seriously erred in concluding that the Border Patrol officers lacked reasonable and articulable suspicion justifying the investigatory stop of respondent Cortez' vehicle, and that its conclusion was based on a legal standard in conflict with the standards established in *Terry* v. *Ohio*, 392 U.S. 1 (1968), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and other decisions of this Court.

We also believe that the court of appeals' decision has important implications for the operations of the Border Patrol and other law enforcement agencies and therefore warrants the Court's review. A large part of the duties of the Border Patrol and other federal agencies responsible for enforcing the immigration and customs laws of the United States are performed in the Ninth Circuit, and those agencies must

necessarily strive to conform their law enforcement methods and practices in that jurisdiction to the decisions of that court. In this case, officers of the Border Patrol undertook an investigation that, in our view, should be considered a model of good police work and of scrupulous compliance with the dictates of the Fourth Amendment: namely, a careful and thorough gathering of information over an extended period of time and a skillful analysis of that information in light of the officers' substantial experience, all of which led them eventually to select one vehicle (out of more than 20 that passed them during their surveillance) for a brief investigatory stop that proved the correctness of their information and conclusions. The court of appeals has now held that the officers' actions and inferences were unreasonable and that officers in those circumstances may not make a brief investigatory stop of a suspected vehicle unless they observe some particular feature of the vehicle or its occupants that indicates criminal activity in and of itself and without regard to other circumstances focusing the officers' suspicion on the vehicle. The consequence of that decision may be significantly to impair effective (and we believe proper) law enforcement actions and to discourage the kind of careful preparatory police work reflected in this case.

1. In *Terry* v. *Ohio* and subsequent cases, this Court has established that police officers may briefly stop a vehicle or detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity but

that do not amount to probable cause—*i.e.*, facts that support a reasonable suspicion, but not necessarily a reasonable conclusion, of criminality. See *Terry, supra*, 392 U.S. at 20-27; *Adams* v. *Williams*, 407 U.S. 143, 146-149 (1972); *United States* v. *Brignoni-Ponce, supra*, 422 U.S. at 880-882. The proper consideration, as the Court stated in *Terry*, is whether an officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (392 U.S. at 21; footnote omitted).

In *United States* v. *Brignoni-Ponce, supra*, this Court applied those principles specifically in the context of vehicle stops by Border Patrol officers. Although the Court concluded that the single factor relied on by the agents in that case—the apparent Mexican ancestry of the occupants—did not furnish reasonable grounds justifying the intrusion, it made clear that other circumstances may furnish reasonable suspicion justifying what the Court recognized (422 U.S. at 880) to be a modest intrusion on the privacy interests of travellers. Thus, the Court stated (422 U.S. at 884-885):

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. * * *

> They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant * * *. Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons * * * are frequently used for transporting concealed aliens. * * * In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.

Under that standard the stop in this case was, we submit, plainly permissible. The officers took into account almost all of the factors identified by the Court in *Brignoni-Ponce* as relevant—the characteristics of the area as sparsely populated and commonly used by aliens entering the country, its close proximity to the border, and the aspects of the vehicle as one capable of concealing a sizeable group of persons and one commonly used for smuggling aliens. Of particular significance, they also relied on "information about recent illegal border crossings in the area," and indeed in this case they were able to deduce from that information a likely and very specific modus operandi in terms of weather conditions, the time of day, the time of the week, and the particular movements of the suspected pick-up vehicle. In sum, it is difficult to imagine a more complete and sufficient set of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] [the] intrusion." *Terry* v. *Ohio*, *supra*, 392 U.S. at 21 (footnote omitted).

2. Notwithstanding all those specific and articulable facts, the court of appeals concluded that there

was not a reasonable basis for the stop because the officers lacked a certain kind of additional information—namely, their direct observation of some aspect of the vehicle or its occupants that in and of itself indicated criminal activity, such as, the court suggested (App. A, *infra*, 7a), mechanical or equipment defects or a violation of the traffic laws.[7] The court's decision thus appears to stand for the legal proposition that founded suspicion can never be established on the basis of what is commonly referred to as circumstantial evidence.

That proposition of law finds no support in this Court's decisions, and it conflicts squarely with the standards that *Brignoni-Ponce* established specifically with respect to the Border Patrol. Moreover, that proposition would not provide a workable standard because there is no meaningful distinction, at least in this context, between the kinds of evidence that can establish reasonable suspicion.

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[7] The court also noted (App. A, *infra*, 7a) that the officers "had no specific information about illegal movement of aliens in the area that night." Although we submit that such "specific information" is not a necessary ingredient for reasonable suspicion, it is difficult to see how such information would have aided the officers under the court of appeals' own view, since it would not have constituted "some additional fact or facts which focus suspicion on the individual or vehicle stopped" (*ibid.*) and would not have provided further grounds for "singling out the Cortez vehicle" (*ibid.*).

The standard suggested by the court of appeals conflicts with *Brignoni-Ponce* because it would make most of the factors identified as relevant by this Court—the characteristics of the area, its proximity to the border, usual traffic patterns, previous experience with alien traffic, recent border crossings, and the type of vehicle stopped—either irrelevant or superfluous. Unless there is some additional and specific aspect of the vehicle that is directly observed and that itself suffices to create a reasonable suspicion of criminal activity, no combination of those other factors apparently can furnish reasonable suspicion satisfying the court of appeals, no matter how compellingly they indicate to a man of reasonable caution that a limited stop for further investigation is warranted. Yet *Brignoni-Ponce* clearly established that all of the factors identified by the Court are relevant; the fact that the Court stated that each of those factors "may" be considered (422 U.S. at 885) further indicates that no single one of those factors must be present in every case.

Furthermore, the standard suggested by the court of appeals is unworkable. *Terry*, *Brignoni-Ponce*, *Adams* v. *Williams* and many other decisions make clear that whether an investigatory stop is based on reasonable suspicion depends on the totality of the information known to the officer, and indeed it could hardly be otherwise. The materiality of any single item of information necessarily depends on all of the information known to the officer, and the court of appeals' distinction between directly ob-

served evidence suggesting criminal activity—which it believes must be present to furnish reasonable suspicion—and circumstantial evidence suggesting criminal activity is a meaningless distinction in this context. Almost any observed characteristic of a vehicle or a person, which may seem entirely innocent in itself, may, on the basis of the totality of the known circumstances, be quite indicative of criminal activity to a person of reasonable caution. Conversely, almost any observed characteristic that might be quite suspicious in some, or even most, contexts, might actually be indicative of innocence in light of all of the circumstances known to an officer. In short, there would ordinarily be no meaningful way by which an officer could conclude that a given set of directly observed characteristics of a vehicle or its occupants does or does not indicate criminal activity unless he considers the total context and all other circumstances known to him.[8]

In sum, the court of appeals' decision imposes an unworkable and unsound standard on law enforce-

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[8] Cases and treatises on the law of evidence often refer to a distinction between direct and circumstantial evidence; circumstantial evidence is generally defined as evidence from which an inference must be drawn to arrive at the proposition asserted, and direct evidence is evidence from which no inference need be drawn. The distinction, however, is only descriptive, and the competency or admissibility of evidence does not turn upon it. Some authorities have recognized that the distinction is not entirely meaningful, since all evidence requires the factfinder to draw at least some inference (*e.g.*, that the eyewitness was not hallucinating). See I J. Wigmore, *Evidence* §§ 25, 26 (3d ed. (1940); *United States* v. *Becker*, 62 F.2d 1007, 1010 (2d Cir. 1933) (L. Hand, J.).

ment agencies operating within its jurisdiction, a standard that would encourage officers to focus on specific kinds of observations that may not be particularly probative in the circumstances and would deter them from making rational decisions on the basis of thorough background investigations.

3. The court of appeals expressed the view (App. A, *infra*, 6a) that all reasonable suspicion cases, including this one, turn on their particular facts, and for that reason the decision below might be viewed as simply the erroneous application of correct legal principles to a particular set of facts, which would not ordinarily warrant this Court's review. We believe that view would be incorrect and that the court's opinion clearly indicates that it is based on a standard of law that, as we have discussed, is erroneous.

It is not entirely clear, however, whether the legal principles stated and applied in the decision below reflect the settled law of the Ninth Circuit. Several Ninth Circuit decisions have upheld investigative stops of vehicles on the basis of the same kind of circumstantial evidence known to the officers in this case.[9] On the other hand, in *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239, 241 (9th Cir. 1975), on

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[9] See *United States* v. *Bates*, 533 F.2d 466, 469 (9th Cir. 1976); *United States* v. *Nunez-Villalobos*, 500 F.2d 1023 (9th Cir. 1974).

To our knowledge, no other court of appeals has suggested that reasonable suspicion may not be based on circumstantial evidence, and we have found no other cases which have drawn a distinction between directly observed and circumstantial evidence in this context. For that reason, and because that distinction (as we have argued) is not

which the court below relied (App. A, *infra*, 6a), the court purportedly applied the legal standard endorsed in the opinion below, although the facts of that case were quite different.[10] Furthermore, in this case our

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a meaningful one, it is difficult to point to any clear conflict among the circuits on this point, except the negative fact that no other circuit has suggested the standard reflected in the decision below.

[10] As Judge Chambers pointed out in his dissent below (App. A, *infra*, 14a), the stop in *Carrizoza-Gaxiola* was based solely on the fact that the defendant was driving a particular kind of automobile, many of which had been stolen.

In *Carrizoza-Gaxiola*, the court referred to the stop as having been based solely on a "profile" of cars that had been stolen, and in this case the court also referred to the stop as being "solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle." App. A, *infra*, 7a. A large number of decisions have concerned the use by law enforcement agencies of "profiles". A profile, as the term is most commonly used, is a set of typical characteristics of a particular type of criminal developed by agents on the basis of their experience, and it is used as part of the basis for stopping a person matching the profile, quite apart from the agents' possession of specific information that the person is engaged in criminal activity. Perhaps the most commonly litigated profiles are ones that have been developed by agents of the Drug Enforcement Administration in connection with a nationwide airport surveillance program designed to detect drug carriers. The courts of appeals are divided on whether reliance on that profile is proper, and that is one of the issues presented in our petition for a writ of certiorari in *United States* v. *Mendenhall*, No. 78-1821 (filed June 5, 1979).

The information relied on by the officers in this case is not a profile as the term is commonly used, because the information was developed in connection with a very specific set of facts and related directly to the criminal activity that was ultimately detected. Nevertheless, the rationale of the court of appeals for rejecting the officers' reliance on this informa-

petition for rehearing en banc was denied (App. B, *infra*, 17a-18a). It thus appears that the decision below does reflect the law of the Ninth Circuit, and the significant implications of the legal question presented, both generally and in the particular context of border policing activities, warrant this Court's review.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1979

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tion—the absence of direct evidence of the particular defendant's criminal activity—is similar to the rationale of those courts that have disapproved reliance on profiles like the DEA profiles, and the issue in this case is analytically similar to the issue presented in *Mendenhall* (see 78-1821 Pet. 16-18 & n.16).

[11] If the Court agrees with our submission that the court of appeals' conclusion is patently incorrect, it may wish to consider summary reversal.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 19, 1979]

No. 77-1987

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JESUS E. CORTEZ, a/k/a JESUS E. CORTEZ-ESPIONZA,
DEFENDANT-APPELLANT

No. 77-1951

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEDRO HERNANDEZ-LOERA, DEFENDANT-APPELLANT

OPINION

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and HUG, Circuit Judges, and
FERGUSON *, District Judge

HUG, Circuit Judge:

Jesus E. Cortez-Espinoz (Cortez) and Pedro Hernandez-Loera (Hernandez) appeal from convictions

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* Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

for knowing transportation of illegal aliens, 8 U.S.C. § 1324(a)(2), contending that the evidence used against them was the product of an illegal vehicle stop by border patrol officers and should have been suppressed. We agree and therefore reverse.

In late December, 1976, border patrol officers found, in the southern Arizona desert, human tracks suggesting that a man, wearing shoes bearing a distinctive "chevron" sole pattern, was engaged in the practice of leading aliens illegally into the United States. The officers inferred from a study of the tracks that "Chevron", as they called him, led groups of from about eight to twenty aliens across the United States-Mexican border at night, on a journey of approximately twenty-five miles on foot to a point on Highway 86 near Sells, Arizona. Highway 86 runs generally east and west between Ajo, Arizona and Tucson. The tracks stopped at the highway and did not reappear anywhere nearby, which suggested to the officers that a vehicle had picked up the aliens. The officers' studies further indicated that Chevron led his groups into Arizona on Friday, Saturday, Sunday or Monday nights, but whether he led groups every weekend they did not know. No one had actually seen Chevron or one of his groups in transit. The latest set of tracks located before the night of the instant arrest was made on the night of Saturday, January 15-16, 1977.

On the Sunday night of January 30-31, 1977, officers Gray and Evans of the border patrol were on duty in the general area. They "felt" that Chevron

would lead a new group that night. It was a hunch, because they had no reason to believe that Chevron operated every weekend, and there was no reason why the expedition could not have occurred on the following night.

The officers did not set up an observation point in the vicinity of the chevron tracks but instead, at about 1:00 A.M. Gray and Evans parked their patrol car about one hundred feet off the highway at a point some twenty-seven miles to the east of the place where the chevron tracks had disappeared in the past. They selected this location because they were primarily responsible for watching the Altar Valley area, where a small road joined the highway, but they believed they could also watch for Chevron's vehicle there.

Gray and Evans decided that in watching for Chevron's vehicle, they would limit their attention to certain kinds of vehicles, and within that class of vehicles, only to those vehicles which passed them travelling westward and returned approximately ninety minutes later, travelling eastward. The class included vans, campers and pickup trucks that could easily hide eight to twenty aliens without drawing attention from any law enforcement authority. The class did not include commercial-looking trucks, nor did it include station wagons or sedans, although the officers knew of the practice of secreting as many as eight aliens in the trunks or rear compartments of these vehicles.

The officers also admitted that they had no reason to know that the vehicle assisting Chevron would approach from, and return to, the east rather than the west. They did not explain why such a vehicle could not approach the pick-up point from one direction and then continue in the same direction. They admitted that if Chevron had led a group across the border before dark that afternoon, he and his group could have been picked up and transported eastward, past the Gray-Evans checkpoint, before the two officers parked there at 1:00 A.M. They admitted that a vehicle could have passed them, gone to Sells, a town west of the chevron tracks, for legitimate purposes and returned within the ninety-minute time frame they established.

Gray and Evans saw two vehicles in this "profile" class, both campers, travelling westward that night. Shortly after 6:00 A.M., one of the two returned, heading east. As the vehicle went by, the officers did not see anyone in the camper, and on neither occasion was the driver speeding or otherwise behaving suspiciously. The officers turned on their flashing red lights and stopped the camper. The officers stated that they would have searched every single vehicle fitting the profile as it returned from the west.

Appellant Cortez was the driver and owner of the camper. When the truck was stopped, appellant Hernandez, wearing the "chevron" shoes, was sitting in the passenger's seat. In the rear compartment of the camper were six aliens who had illegally entered the United States with Hernandez earlier in the evening.

The issue is whether under the Fourth Amendment adequate cause existed to justify the stop of the camper. The courts have recognized that brief, investigatory stops under circumstances not constituting probable cause for arrest or search are permissible for effective law enforcement. *United States* v. *Avalos-Ochoa*, 557 F.2d 1299, 1301 (9th Cir. 1977).

The quantum of cause necessary in such cases was established by the Supreme Court in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). "[O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country". 422 U.S. at 884.

This lesser standard is justified on the theory that the Fourth Amendment must apply to a "stop", as well as to an arrest or seizure; however, because the intrusion upon privacy is not as great, the range of unreasonable police behavior is correspondingly less broad. *United States* v. *Brignoni-Ponce*, 422 U.S. at 779-81; *see also Terry* v. *Ohio*, 392 U.S. 1 (1968).

The *Brignoni-Ponce* test has often been referred to, in more general terms, as the "founded suspicion" test. *See United States* v. *Avalos-Ochoa*, 557 F.2d at 1301; *United States* v. *Rocha-Lopez*, 527 F.2d 476 (9th Cir.), *cert. denied*, 425 U.S. 977 (1976). We will use that term. We must determine whether founded suspicion existed at the time the officers

turned on the flashing red lights atop their vehicle; nothing that happened afterward can be relied upon to justify the stop. *United States* v. *Morrison*, 546 F.2d 319 (9th Cir. 1976); *United States* v. *Avalos-Ochoa*, 557 F.2d 1299.

Finally, we note that the ultimate question on appeal is whether the trial judge's finding that founded suspicion was present here was clearly erroneous. *United States* v. *Patterson*, 492 F.2d 995 (9th Cir.), *cert. denied*, 419 U.S. 846 (1974); *United States* v. *Thompson*, 558 F.2d 522 (9th Cir. 1977); *United States* v. *Page*, 302 F.2d 81, 85 (9th Cir. 1962) (*en banc*).

The founded suspicion test plainly requires balancing of the facts of the particular case, see *Brignoni-Ponce*, 422 U.S. at 884-85, and in such circumstances we will not find absolutely controlling precedent since the facts will differ. A case from our court which is quite closely related is *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).

In that case, officers routinely stopped southbound vehicles in a "profile" class of automobile models thought likely to be stolen and transported from Phoenix or Tucson into Mexico. The "*profile*" was, we may say, constructed from specific, articulable facts. Nevertheless, we said: "Founded suspicion requires some reasonable ground *for singling out the person stopped* as one who was involved . . . in criminal activity" (emphasis added) (523 F.2d at 241). We pointed out that Carrizoza-Gaxiola, himself, was

doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle.

The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped. As Mr. Justice Harlan said, discussing the *Terry* standard in his concurring opinion in *Sibron* v. *New York*, 392 U.S. 40, 73 (1968), "[T]here must be something at least in the activities *of the person* being observed or in his surroundings that affirmatively suggests *particular* criminal activity . . .". (emphasis added) It is not enough that the officer has a hunch that criminal activity is afoot. *United States* v. *Torres-Urena*, 513 F.2d 540 (9th Cir. 1975).

The officers did not have a valid basis for singling out the Cortez vehicle. They saw no one in the camper. They saw nothing suspicious about the vehicle itself. They had no specific information about illegal movement of aliens in the area that night. They observed no mechanical or equipment defects in connection with the vehicle. They observed no violation of the traffic laws as in *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977). The sole suspicious fact connected with this specific vehicle was that it passed the officers' post headed west and returned headed east, both times in the pre-dawn hours. The passage of nearly two hours' time and the fact that the vehicle could have traveled to a small town and

returned within that time, both furnish far too many innocent inferences to make the officers' suspicions reasonably warranted. *See United States* v. *Ogilvie*, 527 F.2d 330 (9th Cir. 1975) (turning off highway and turning around).

Each appellant raises a second issue. Cortez complains of a jury instruction and Hernandez claims that his sentencing process was defective. Because of our resolution of the issue jointly raised, there is no need for us to reach these two claims.

The stop of Cortez' vehicle was a violation of the appellants' rights under the Fourth Amendment. The evidence adduced at trial was a direct product of the constitutional violation and should have been suppressed.

The convictions are reversed.

CHAMBERS, Circuit Judge, dissenting:

I find no error, much less clear error, in the district judge's conclusion that there was founded suspicion to stop this vehicle. He listened to the witnesses, obviously credited the officers' testimony, and then ruled that they acted on founded suspicion. This Court rarely interferes in a trial judge's findings as to witness credibility. In any event, I find no suggestion that the majority wish to interfere. I find nothing to indicate that the officers' testimony is not to be believed or that the officers manufactured the evidence which they said led them to suspect and to stop this vehicle. As I read the majority opinion, it is that the information which the officers had be-

fore them, and the reasonable inferences drawn from it, was insufficient as a matter of law to permit them to make this stop. I disagree.

The officers put together a series of suppositions drawn from their specialized experience in investigating alien smuggling along the Arizona border with Mexico. Each of these suppositions proved to be totally founded in fact. But the majority says that it was unfounded in law. The majority says it was a blind hunch. I call it responsible police work.

What were these suppositions? The officers testified that they knew from official reports from their colleagues, and from personal investigation on their own part, that a guide whose shoes bore a distinctive chevron design was leading groups of aliens across the border along a well-defined route. It began near the border town of San Miguel, passed through the Baboquivari Valley, and ended at an area between Mileposts 114 and 122 on Highway 86, less than 30 miles north of the border. Two weeks earlier, one of the officers had personally tracked Chevron along this route for more than 22 miles. Both officers were unquestionably well-trained as trackers. They could tell that Chevron was probably of Latin descent, that he usually led groups of from 8 to 20 aliens, and that they never meandered but proceeded by forced march in a determined manner. From this the officers drew the reasonable conclusion that Chevron was a professional and that the aliens were not mere transients. The officers knew from their experience that professional smugglers in this particular area always

work at night, and Chevron's tracks indicated that he traveled at night. The officers knew that border crossings were preferably made in good weather, when the sky is clear and there is good moonlight. They also knew that Chevron preferred to travel on or near weekends.

The night in question was the first clear night after a rainy three-day period that had included a weekend. The officers' primary responsibility that night was watching the junction of Route 286, running north from Sasabe, with Route 86 at a location called "Three Points". Obviously the officers did not *know* that Chevron would be crossing that night, but both, in their experience, believed that he would attempt it that night. They therefore decided to watch not only the junction with Route 286, but also to keep watch for any vehicle or vehicles that might be used to pick up aliens from the vicinity of Mileposts 114 to 135. Their car was stationed off the road very close to Milepost 149 on Route 86, or about 27 to 35 miles east of the vicinity where Chevron was known to bring his groups.

They computed the distance to be traveled on foot by the aliens and estimated that if Chevron did not cross the border until dark, then the trip could not begin before 6 p.m. On a forced march he would arrive at the pick-up area no earlier than 2 a.m. and no later than 6 a.m. The officers therefore gave special attention to these morning hours. Furthermore, they knew that if Chevron brought a group of between 8 and 20 (which was his pattern), he would

have to be met by a vehicle capable of carrying that number of people. They knew that campers were widely used for this purpose by professional smugglers; they therefore gave close attention to campers traveling on Route 86 during these hours.

The officers were particularly on guard for vehicles traveling in a westward direction on Route 86. They obviously could not be sure that a pick-up vehicle would be traveling in that direction, but they articulated clearly their reasons for believing that this would be the direction that would be followed. On prior trips, after reaching Route 86, Chevron had always led his groups on foot along the side of the road *in an eastward direction.* From this the officers reasonably assumed that the group would be walking *toward* and not away from the pickup vehicle—and *toward* and not away from their ultimate destination. Otherwise, after an arduous, forced nighttime march of over 25 miles, they would be walking *away from* the vehicle that was coming to meet them. And they would be walking with their backs to the approaching vehicle, not facing it in a position to identify the oncoming traffic.

At about 4:30 a.m. the officers saw a yellow-green camper, with a license beginning "GN-88", traveling west on Route 86. About 20 minutes later they saw another camper (license not visible) also traveling west. They were suspicious of both. These were the only vehicles which aroused their suspicion, out of the 12 to 20 westbound vehicles that passed during those morning hours. Others did not meet the profile

that they knew from experience were vehicles used to pick up smuggled aliens. They estimated that it would take about an hour and a half to drive the 27 to 35 miles to the pick up area, find the aliens, load them, and return to Milepost 149. One hour and forty minutes later, at 6:12 a.m., the yellow-green camper reappeared at Milepost 149, now heading east. Faced with the decision of letting it pass, or stopping it to make a brief inquiry, the officers decided to stop it. The majority say they should have let it drive on.

A little must be said of the nature of the terrain in this part of Arizona. We can take judicial notice that the major east-west artery in southern Arizona is Interstate 10 which approaches Tucson from the east and then continues west to Casa Grande where it becomes Interstate 8, and continues west to Gila Bend and Yuma.

Route 86, on the other hand, is a much smaller and less traveled road forming a wide southwesterly arc from Tucson on the east to Gila Bend on the west. Leaving Tucson it heads southwest into the southern portion of the Papgo Reservation and generally parallels the Mexican border. It then joins Route 85 which goes northwest to Ajo and Gila Bend. The testimony is that this is desolate desert terrain, interspersed with mountain ranges. In its less than 100 miles of length it goes through only one area of any population—the Indian village of Sells, which according to the 1970 census had a popluation of 750. The area south of Route 86, between the Baboquivari

and La Lenza Mountains, has less than 100 scattered residents. It was through this area, notorious for alien smuggling, that Chevron was bringing his groups.

The portion of Route 86 between Milepost 149 (where the officers were located) and Mileposts 114 to 122 (where they expected Chevron to arrive) is an unpopulated area. The officers testified that there were only "a couple" of houses along this stretch of road. At least one of the officers obviously knew the local residents; he testified that he had recognized another car as belonging to a local resident.

It is not reasonable to ignore the utter loneliness of the area in question. What might be "unfounded" suspicion in a more populous area of this circuit can be very "founded" suspicion in the barren desert of border Arizona. The round trip of a non-local camper on this stretch of Route 86, between 4:30 and 6:12 a.m., could not help but arouse the suspicion of any well-trained border patrolman. It is clear that officers "may consider the characteristics of the area in which they encounter a vehicle", including its proximity to the border, traffic patterns, "and previous experience with alien traffic." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-5 (1975). Mere presence near the border in a notorious smuggling area, at 6:40 a.m. when traffic was "light", provided founded suspicion for the stop of a non-local vehicle in *United States* v. *Rocha-Lopez*, 527 F.2d 476 (9th Cir. 1976).

The majority, in my view, fails to take the terrain and the time of day properly into account. Otherwise, they would not be stating that this case "is quite closely related" to *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).[1] In that case, officers stopped a Ford LTD being driven by a Mexican-appearing driver, merely because they knew that Ford LTDs were popular among car thieves who sell them in Mexico. The stop was made solely on the "profile" of LTDs being susceptible of car theft. The stop in *Carrizoza-Gaxiola* was made on Interstate 19, described accurately by Judge Wallace as "a major highway between Nogales and Tucson". I have grave difficulty accepting any comparison of Interstate 19 (at time unknown) with Route 86 between 4:30 and 6:12 a.m. The majority state that the camper, on its round trip on Route 86, during these hours, might have been visiting a small town. Granted. It was possible that this camper was making a round trip to Sells; but it is hardly probable. This conduct, like that in *United States* v. *Kandlis*, 432 F.2d 132, 136 (9th Cir. 1970), was "a very, very suspicious circumstance which justified further inquiry." The test is reasonable, or founded, suspicion. This does not require that the behavior in

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[1] In *Carrizoza-Gaxiola*, this Court affirmed the district court order which granted a motion to suppress, thereby recognizing the district court's particular ability to make findings on credibility. See Judge Enright's concurrence. 523 F.2d at 241-2. Here the majority reverse the district court's order denying a motion to suppress.

question be inconsistent with innocence. *United States* v. *Blackstock*, 432 F.2d 908 (9th Cir. 1970).

The mere fact of a round trip at this time of day, in this location, given the notorious reputation of the area for alien smuggling, was sufficient to support the officers' claim of founded suspicion.

But this information was clearly not the only information that these officers had. They had the further information of Chevron's modus operandi and from that information they had constructed a hypothesis as to his activities on the very night in question. Those pieces of information, even if they would not support founded suspicion when considered individually, surely supported founded suspicion when considered collectively. Each circumstance gained its significance because of its presence with the others; their combined weight added up to founded suspicion. *United States* v. *Avalos-Ochoa*, 557 F.2d 1299 (9th Cir. 1977); *United States* v. *Pulido-Sanoyo*, 580 F.2d 352 (9th Cir. 1978).

United States v. *Brignoni-Ponce*, supra, recognizes the validity of permitting an officer "to assess the facts in light of his experience in detecting illegal entry and smuggling". In this case the officers, on the basis of their experience, put together a series of clues and concluded that there was a strong possibility that Chevron would bring a group of aliens across the border on this night and hour and place, and that he would be met by a vehicle of this sort, traveling in this direction. The clues, as they ana-

lyzed them, were absolutely correct in each detail. I fail to see that suspicion, based on this sort of skillful police analysis, can be called "unfounded" within the test of *Brignoni-Ponce*. I therefore dissent.

/s/ Richard H. Chambers
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 19, 1979]

No. 77-1987

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JESUS E. CORTEZ, a/k/a JESUS E. CORTEZ-ESPIONZA,
DEFENDANT-APPELLANT

No. 77-1951

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEDRO HERNANDEZ-LOERA, DEFENDANT-APPELLANT

OPINION

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and HUG, Circuit Judges, and
FERGUSON *, District Judge

On June 4, 1979, appellee filed its Petition for Rehearing with Suggestion for Rehearing en banc.

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* Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

Judges Hug and Ferguson voted to deny the petition for rehearing; Judges Chambers and Hug voted to reject the suggestion for a rehearing en banc; Judge Ferguson recommended the rejection of the suggestion for a rehearing en banc; and Judge Chambers voted to grant a rehearing.

The full court was advised of the suggestion for an en banc rehearing; no judge has requested a vote on this. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 300527 74

Supreme Court, U. S.
FILED
AUG 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-404

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

Petition for writ of certiorari filed September 10, 1979
Certiorari granted June 9, 1980

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No. 086

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF,

v

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA,
DEFENDANTS.

RELEVANT DOCKET ENTRIES

1. 02-01-77 (ALL) File complaint (INS)
2. 02-01-77 File Affid. for Bail on Detent. of Witns.: Migual Mondragon-Rubio; Alberto Alvarado-Martinez; Evadio Escamilla-Aguilar; Fidel Ruiz-Mora; Alfredo Alvarado-Martinez and Francisco Javier Baltazar-Baltazar.

— 02-02-77 DKT. ENTRY (RTT): Upon questioning of the alleged material witnesses, the Magistrate finds that they are not citizens of the United States. Court to appoint counsel. Each material witness committed to Pima Count Jail in lieu of $500.00 bond.

3. 02-02-77 File order app/c for deft. CORTEZ, Bruce F. Rinaldi
4. 02-02-77 File order app/c for deft. HERNANDEZ, Bernardo Velasco.
5. 02-03-77 File order app/c for Mat. Witnesses, Brian Edward Smith.

— DKT ENTRY (RTT): Deft. CORTEZ present with counsel pursuant to defendant's motion for reduction of bond. The Magistrate orders that bond be reduced to $1,000 Pers. App. Bond.

6. 02-08-77 File deft. CORTEZ'S $1,000 Pers. App. Bond & ord. spec. conditions of release.
7. 02-15-77 INDICTMENT (6 Cts) as to each deft.
8. 02-17-77 Notice of Setting of Case for Arr. as to deft. CORTEZ set for 2/22/77 at 2:30 p.m.

— 02-22-77 MINUTE ENTRY (RTT): On for Arr. Ea. deft. pres. w/c. Ea. deft. arr., states T/N same. Deft. CORTEZ PNG to Cts. 1 thru 6 of indict. Order cont. for trial to Thurs., Mar. 31, 1977 at 9:00 a.m. before Judge Murphy. Fur. Order ea. deft. granted 10 days to file motions.

9. 02-25-77 File Stipulation as to deft. CORTEZ re: conditions of release.
10. 02-25-77 Enter Order modifying deft. CORTEZ's conditions of release. (RTT) (Copies to AUSA, USM, USPO, RINALDI)
11. 03-02-77 Deft. HERNANDEZ's Motion to Suppress and Notice of Hearing set for 3/21/77 at 9:00 a.m.

— 03-03-77 MINUTE ENTRY (Judge Murphy): IT IS ORDERED that the hearing date previously set for the Motion to Suppress on 3/21/77 as to deft. HERNANDEZ is vacated and reset for hearing on Monday, 3/28/77 at 9:00 a.m. (Copies to BRUCE RINALDI, FPD, AUSA)

12. 03-07-77 Deft. CORTEZ's Joinder in Motion to Suppress Filed by Defendant HERNANDEZ's Motion to suppress.
13. 03-11-77 Govt's Opposition to Deft. HERNANDEZ's motion to Suppress.

— 03-28-77 MINUTE ENTRY (Judge Murphy): On for hearing on defts' Motion to Suppress. Defts. CORTEZ-HERNANDEZ Pres. w/c. Motion denied.

14. 03-28-77 List of Exhibits and Witnesses.
15. 03-31-77 List of Exhibits and Witnesses.
16. 03-31-77 Enter verdict as to deft. HERNANDEZ: GUILTY as chgd. in Cts. 1-6.

— 04-01-77 MINUTE ENTRY (Judge Murphy): On for jury trial—2nd day as to deft. CORTEZ. Deft. pres. w/c. Myron Stolle, Ct. Rptr., pres. Jury retires to deliberate at 9:00 a.m. Mistrial declared, order case cont. to Thursday, 4/14/77 at 9:00 a.m. for trial.

17. 04-01-77 Note #1 from Jury.

18. 04-01-77 Note #2 from Jury.

19. 04-01-77 Note #3 from Jury.

— 04-14-77 MINUTE ENTRY (Judge Murphy); On for jury trial re-trial. Deft. CORTEZ pres. w/c. John Davis, Ct. Rptr, pres. Jury impaneled and sworn. Rule invoked. Motion for Judgment of Acquittal denied; renewed, and and denied. Motion to strike Court's instruction re: mendacity Deft. renews motions previously made, motions denied. Jury retires to deliberate at 3:25 p.m.; returns with verdict at 4:05 p.m.: GUILTY. Order cont. for sent. to 4/29/77 at 9:00 a.m. Order deft's bond revoked. Deft. committed to custody of U.S. Marshal pending sentence.

20. 04-14-77 List of Exhibits and Witnesses.

21. 04-14-77 Enter verdict as to deft. CORTEZ: GUILT as chgd. in Cts. 1-6.

22. 04-15-77 Govt's Motion for Release of Detained Witnesses and enter Order that Miguel Mondragon-Rubio, Alberto Alvarado-Martinez, Evadio Escamilla-Aguilar, Fidel Ruiz-Mora, Alfredo Alvarado-Martinez and Francisco Javier Baltazar-Baltazar be released from custody of U.S. Marshal, there being in existence detainers for each m/w placed by Immigration and Naturalization service. (Judge Murphy) (Copies to USM, AUSA, Enriquez, FBD, Rinaldi)

— 04-26-77 MINUTE ENTRY (Judge Murphy): On for sent. Deft. HERNANDEZ pres. w/c. Judgment imposed: Cts. 1 thru 6-5 years. impr., and fine of $2,000.00 on ea. ct. Terms of impr. to run or be served conc. Fines imposed are consec. fines. Total fine $12,000.00 Deft. advised of right to appeal. No bail on appeal be set.

23. 04-26-77 Enter Judgment & Commitment as to deft. HERNANDEZ. (Judge Murphy) (Copies to USA, USM, PO, FBD, Deft.)

24. 04-26-77 Deft. HERNANDEZ'S Notice of Appeal. (Copies to USA, FPD, PO, U.S. Magistrate, CCA, Court Reporters David Lundy & Pat Vigil)

— 04-29-77 MINUTE ENTRY (Judge Murphy): On for sent. Deft. Cortez pres. w/c. Judgment imposed on Cts. 1 thru 6: 5 yrs. impr. on ea. ct. Terms of impr. imposed to run or be served conc. with each other. Deft. advised of right to appeal. Bond on appeal set in the sum of $5,000.00 surety.

25. 04-29-71 [*sic*] Enter Judgment & Commitment. (Judge Murphy) (Copies to USA, USM, PO, B. Rinaldi, Defendant)

26. 04-29-77 Deft. CORTEZ'S Notice of Appeal (Copies to USA, Bruce Rinaldi, Esq., CCA, U.S. Magistrate, PO, Court Reporters D. Lundy, M. Stolle, J. Davis & Pat Vigil)

27. 05-04-77 Deft. CORTEZ'S Petition for Bond Reduction.

28. 05-04-77 Affidavit of Attorney on Petition for Bond Reduction as to deft. CORTEZ.

29. 05-05-77 Designation of Record on Appeal as to Deft. CORTEZ. Copies issued.

30. 05-05-77 Designation of Record on Appeal as to Deft. HERNANDEZ. Copies issued.

— 05-09-77 MINUTE ENTRY (MAR): Hearing on deft's motion to reduce bond on appeal. Deft. CORTEZ pres. w/c. Hearing had. Ordered, Court takes matter under advisement.

31. 05-18-77 File Stipulation that appeal bond for Deft CORTEZ may be fixed at $5,000.00, to be secured by a property satisfactory to the U.S. Attorney.

32. 05-18-77 Enter Order that appeal bond as to Deft. CORTEZ is fined at $5,000.00 to be secured by a

property bond satisfactory to the U.S. Attorney. (MAR) (Copy to USA, Rinaldi, Financial)

33. 05-27-77 Deft. CORTEZ'S $5,000.00 Criminal Appeal Bond; approval of the Court endorsed thereon. (MAR)

34. 05-27-77 Deft. CORTEZ'S Justification on Criminal Appeal Bond.

35. 05-27-77 Copy of CCA Order for Time Schedule. (Copies to Magistrate, AUSA, FPD, David Lundy) (Deft. HERNANDEZ)

36. 06-01-77 Copy of CCA Order for Time Schedule Re Defendant CORTEZ.

No. CR 77-086-TUC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF,

v

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA,
DEFENDANTS

INDICTMENT
[8 U.S.C. § 1324(a)(2):
Transporting Aliens]
(Filed February 15, 1977)

COUNT ONE
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Miguel Mondragon-Rubio was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT TWO
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO

HERNANDEZ-LOERA knowing that a certain alien, to-wit: Alberto Alvarado-Martinez was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT III
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Evadio Escamilla-Aguilar was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT IV
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Fidel Ruiz-Mora was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT V

[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Alfredo Alvarado-Martinez was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT VI

[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Francisco Javier Baltazar-Baltazar was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL

/s/ _____

KARL BRANDT

Foreman

WILLIAM C. SMITHERMAN

United States Attorney

/s/ _____

DANIEL G. KNAUSS

Assistant United States Attorney

(9)

United States of America vs.

United States District Court for

DEFENDANT: JESUS CORTEZ-ESPINOZA

DISTRICT OF ARIZONA

DOCKET NO. CR-77-086 Tuc. (TFM)

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH April DAY 29 YEAR 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Bruce F. Rinaldi, Esq. (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of violating Title 8, United States Code, Section 1324(a)(2), transporting illegal aliens, as charged in Counts I, II, III, IV, V and VI of the Indictment filed herein.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on each of Counts I, II, III, IV, V and VI. The terms of imprisonment imposed herein shall run or be served concurrently.

SPECIAL CONDITIONS OF PROBATION

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ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

THOMAS F. HUFFMAN

4/29/77

(31)

75

(10)

United States of America vs.

United States District Court for

DEFENDANT: [ ] DISTRICT OF ARIZONA

[PEDRO HERNANDEZ-LOERA] DOCKET NO. [CR-77-086 Tuc. (TFM)]

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH April DAY 26 YEAR 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL [Bernardo P. Velasco, Assistant Federal Public Defend]
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. Counts I thru VI

Defendant has been convicted as charged of the offense(s) of violating Title 8, United States Code, Section 1324(a)(2), transporting illegal aliens, as charged in the Indictment filed herein.

The Court finds that the defendant was twenty-five (25) years of age at the time of conviction and is not suitable for handling under the Federal Youth Corrections Act.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and fined the sum of Two Thousand ($2,000.00) Dollars on each of Counts I, II, III, IV, V and VI. The terms of imprisonment shall run or be served concurrently. The fines imposed herein shall be cumulative fines. The total fine to be paid is Twelve-Thousand ($12,000.00) Dollars.

FILED
APR 26 1 55 PM '77
CLERK, U.S. DISTRICT COURT

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Thos F. Murphy
THOMAS F. MURPHY

36

(29)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 77-086-TUC-TFM

MOTION TO SUPPRESS

UNITED STATES OF AMERICA, PLAINTIFF,

v

JESUS CORTEZ-ESPINOZA
PEDRO HERNANDEZ-LOERA,
DEFENDANTS.

Tucson, Arizona
March 28, 1977

Before the HONORABLE THOMAS F. MURPHY
United States District Judge

APPEARANCES

For the Government: James P. Mueller, Esq.
Assistant U.S. Attorney

For Defendant Cortez: Bruce Rinaldi, Esq.

For Defendant Hernandez: Bernardo Velasco, Esq.
Assistant Federal Public
Defender

Interpreter: Laura Murphy

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* * * * *

[2] THE COURT: CR-77-086, United States of America versus Jesus Cortez-Espinoza, Pedro Hernandez-Loera.

MR. VELASCO: Bernardo Velasco, on behalf of Pedro Hernandez-Loera.

MR. RINALDI: Bruce Rinaldi, appearing on behalf of Jesus Cortez-Espinoza.

MR. VELASCO: Your Honor, I filed a motion and Mr. Rinaldi joined in. The Government is not here.

THE COURT: Oh, no? Does that mean they've defaulted?

MR. VELASCO: I would think so.

THE COURT: You do? That makes it easy.

MR. RINALDI: I'll submit it on the police report.

THE COURT: I saw Sarah Bailey on the other floor.

MR. VELASCO: She's Civil.

THE COURT: You wanted to call somebody?

THE CLERK: Yes, Judge.

(Short pause.)

THE COURT: It's been suggested you might concede the case.

MR. MUELLER: No, afraid I can't do that, your Honor.

MR. VELASCO: Invoke the Rule, your Honor.

MR. RINALDI: Invoke the Rule, your Honor.

THE COURT: We'll put somebody on the stand and [3] let the other people stay outside. Do we have chairs for them outside?

MR. MUELLER: I have no idea.

Agent Rayburn will be first.

(Government's Exhibits 1 and 2 were marked for identification.)

JAMES RAYBURN,

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q Will you state your full name?

A James Rayburn.

Q Your occupation?

A Border Patrol agent.

Q How long have you been with the Border Patrol?

A Eight years.

Q And have you been stationed in the Tucson area?

A Yes, sir.

Q How long is that?

A For that eight years.

Q And were you involved in a case on or about January 31, 1977, involving a person by the name of [4] Hernandez-Loera?

A Yes, sir, I was called there to assist some other agents.

Q At that time did you take a photograph of the shoes of that particular person?

A Yes, sir, I did.

MR. RINALDI: Just a second, your Honor, I object at this point in time, I think he's talking about incidents that occurred after the arrest.

THE COURT: You're not suggesting he changes shoes every once in a while?

MR. RINALDI: No, I'm just suggesting I don't think any evidence obtained after the stop is or may be a basis for substantiation of the stop.

THE COURT: What about searches of people's clothing after they've been arrested. You may have an exception, however. He said he did take a photo of somebody's shoes.

Q (By Mr. Mueller) Do you see the person in the courtroom whose shoes were photographed by you?

A Yes, sir, I do.

Q Will you tell the Court where that person is seated and what that person is wearing?

A He's seated to the rear talking to the lady wearing a dark green shirt.

[5] MR. MUELLER: May the record reflect, your Honor, that the witness has identified the defendant Hernandez-Loera?

THE COURT: I'll agree with you the witness identified a man who's sitting next to Mrs. Murphy and is wearing a dark green shirt.

Q (By Mr. Mueller) Do you have a copy or do you have the photograph you took on that particular day?

A Yes, sir, I do.

Q Was it taken on January 31?

A Yes, sir.

Q Where was it taken?

A At the Tucson Border Patrol office.

Q And have you retained custody of it since that time?

A Yes, sir.

Q You brought it to court today?

A Yes, sir, I have.

Q Is that marked Government's Exhibit 1? Would you look on the back? Is there a yellow tag?

A Yes, sir. Well, I don't know if a number is there.

Q Does it look smudged?

A Yes, sir.

Q Is that a true and accurate representation of the soles of the shoes that were worn by the man you've just identified?

A Yes, sir.

[6] MR. MUELLER: Your Honor, I move to admit that into evidence.

THE COURT: Show it to Counsel, please.

MR. RINALDI: Could I voir dire the witness on this exhibit?

THE COURT: I don't think that's the right word, but you can do it, yes.

MR. RINALDI: I'm not sure what I'm doing—

THE COURT: No, you said you were going to voir dire the witness. Those are old old Norman French words and they don't mean what you think they mean, but go ahead, try it.

VOIR DIRE EXAMINATION

BY MR. RINALDI:

Q When did you take this picture and the approximate time on that?

A Time of day?

Q Yes.

A In the morning, I don't recall, I think my hours then were seven to three and a half p.m. It would have been possibly around 9:00 a.m., I'm not positive.

Q I take it all of these pictures were taken after the defendant was arrested, is that correct?

A Yes, sir.

[7] A And after he had been stopped?

A Yes.

MR. RINALDI: I would object to the admission of it on the basis it's evidence obtained after the stop and evidence obtained after the stop and search can't be used as a basis for justifying the search.

THE COURT: I'll allow it, yes.

Exhibit 1, is it marked right.

MR. MUELLER: It hasn't been marked right in evidence.

(Government's Exhibit 1 received in evidence.)

FURTHER DIRECT EXAMINATION

BY MR. MUELLER:

Q Prior to January 31, 1977, had you ever heard of a shoe or sole marking like that?

A Yes, sir, I have.

Q Would you relate to us what you had known about it prior to that?

MR. RINALDI: I'm going to object to anything that's hearsay, your Honor.

THE COURT: I can't tell. It might not be hearsay, he might be the manufacturer and knows it from his own personal knowledge. So you have to wait like I have to wait.

[8] MR. RINALDI: Well, I think his question was: Had you heard anything about these shoes.

THE COURT: He also used the word "know".

MR. RINALDI: As long as he limits it to what he knew.

THE COURT: Come on, make it look like a lawsuit, come on.

All right.

Q (By Mr. Mueller) Would you relate to us?

A On January the 16th of 1977 I was assigned to tracking duties on the Indian reservation down off the Itak Road about four miles up from the U.S.-Mexican border.

Q Would you tell us where the Itak Road is, more specifically? We have a chart marked Exhibit 2. Would that help you in describing it?

A Yes, sir, it runs off of San Miguel Road which runs—it's—San Miguel Road is a road coming off of Highway 86 out of Sells, Arizona, goes down to the Mexican border. Itak Road runs off of this San Miguel Road. It heads back in toward the border.

Q Do you see the chart in front of you there?

A Yes, sir.

Q That's marked Exhibit 2 for identification. Do you recognize what's shown on that chart?

A Yes, sir, I do.

[9] Q Is this area you described shown on that?

A Yes.

Q Is it marked specifically or could you put that in on the chart?

A Beg your pardon, sir?

Q Could you mark that on the chart?

THE COURT: Mark what on the chart? Itak Road?

MR. MUELLER: Yes.

THE COURT: Yes.

THE WITNESS: With a letter, sir?

MR. MUELLER: Just mark the road—

THE COURT: Evidently the road is there, he wants to know shall he identify it.

Q (By Mr. Mueller) Designate it as Itak Road.

A It's so marked by name, the road into Topawa, into Itak would be Itak Road.

Q Then would you mark with an X with a circle around it then a letter A beside it, where you began this tracking that you told us about? Have you done that?

A Yes, sir.

Q Now, where would that be located in relation to the border?

A It would be straight north about four miles from the border, sir.

Q All right. Describe for me what you observed, [10] based on your tracking that day?

A Agent Gray had been on this truck track prior to my joining him on motorcycle, and the group of aliens, I believe had a group of about fourteen to sixteen illegal aliens.

MR. RINALDI: Just a second.

THE COURT: I think the question was, if you recall it, would you describe what you did. Wasn't that the question, Mr. Mueller?

MR. MUELLER: Yes, and what he observed.

MR. RINALDI: Oh. Can I voir dire the witness then at this point, your Honor?

THE COURT: Of course not. You do that, you ask for permission for the voir dire examination when some

exhibit is about to be offered, and not when you're surprised about testimony.

Q (By Mr. Mueller) Will you continue, please, and relate to us what you observed and what you did?

A Amongst this truck track was—

THE COURT: Are we talking about what you saw or what he saw?

THE WITNESS: What I actually saw.

Amongst this truck track was this chevron design print, was a print I'd previously seen in the Sells trailer where we work our detail out of.

[11] Q (By Mr. Mueller) Would you explain that more fully what you mean by having previously seen this?

A I was asked to assist Casa Grande Border Patrol agents in processing a large group of aliens.

Q When was this?

A I don't recall the date, sir?

Q Approximately what month, what part of the month?

A December.

Q What part of December?

A The beginning of December, early December I would say.

THE COURT: In the year before are you talking about or some other?

THE WITNESS: 1976, sir.

Q (By Mr. Mueller) Tell us what happened.

A While I was assisting them they pointed out that they had drawn this picture from a print that appeared to be—well, that they had established was guiding—

MR. RINALDI: Objection, your Honor.

THE COURT: Immaterial, I have trouble following who they are and what it was that they were pointing to. Will you start again? You say it was early in December of last year when you were making some assisting—or you were doing some assisting somewhere.

THE WITNESS: Yes, sir, I was assisting them in [12] processing a group of illegal aliens.

THE COURT: Assisting them means other—

THE WITNESS: Other border patrol agents from the Casa Grande station, two agents were on detail at Sells at that time.

THE COURT: And what happened during that assisting?

THE WITNESS: They showed the track to us, asked us to be alert, to be looking for this particular print, as this print was guiding illegal aliens up from Mexico.

MR. RINALDI: I object, your Honor, on the basis that's hearsay what they told him what the track has been doing.

THE COURT: Yes, but what's wrong with it, though?

MR. RINALDI: Well, he's offering it as evidence the track is in fact—

THE COURT: No, he was told to watch this track, he says somebody told him they were the tracks of other aliens, but I don't see what makes it inadmissible.

MR. RINALDI: Because—

THE WITNESS: It's how.

THE COURT: It's how he acquired some knowledge, like I did when you were in college, the professor said, Look at this and see if you don't learn something. I'll allow it, you may have an exception. All right.

[13] Q (by Mr. Mueller) Continue and tell us about this occasion when you were assisting the Casa Grande officers.

A In showing the track to us they pointed out to us it had eight forward pointing chevrons in the front part of the sole of the boot, had three rear pointing chevrons in the heel of the boot with the last chevron pointing forward to form an X or a laying down X in the heel.

Q Did they show this to you on some kind of a drawing?

A They had a drawing of it in the trailer.

Q Where was this drawing?

A They had it pinned up on the wall of the trailer right near the door.

Q Did it have any—was it there for a particular purpose, to your knowledge?

A Yes, sir, previously a case that they had handled, the illegal aliens had identified the man as having been the man they arranged to guide them up to meet a smuggler off of Highway 86.

Q Why was this posted on the wall in the trailer at the Border Patrol trailer?

A To alert other agents to this as they went on detail. It was a way of passing the information on to other officers that would be working the area.

[14] Q Okay. And so getting back to January 16, did you see this same track again?

A Yes, sir.

Q And it was among a group of other tracks?

A Yes, sir, it was.

THE COURT: Wait, I got lost on that, Mr. Mueller. Is January 16 the—

MR. MUELLER: I believe this is the day he related he was out cutting the sign.

THE COURT: I'm sorry, yes.

Q (By Mr. Mueller) All right. Go back to that point in time.

A To the January 16th date?

Q January 16, yes. You were at Itak Road about four miles north of the border?

A Yes, sir, we then proceeded on this group of illegal aliens from that point up to about Milepost 19 on Highway 86.

Q Who was with you?

A Agent Gray.

Q Agent Wayne Gray?

A Yes, sir.

THE COURT: I got lost. You didn't follow the track all the way up to Milepost 18, did you?

THE WITNESS: Yes, sir, we did.

[15] Q How many miles did you cover?

A Approximately, well, the speedometer on my bike I clocked 22 miles.

Q How did you do this tracking?

A On motorcycle.

Q You and—

A Agent Gray.

Q You and Border Patrolman Gray had a cycle each?

A Yes, sir.

Q And will you describe this path or this track that you followed. Tell us something about it.

A The group as a whole, sir?

Q Yes.

A They were difficult to make an accurate count on the group as they were walking more in a single file, except for where obstacles would cause them to fan out. It was at these fan out like indications that we attempted to make an accurate count of the track. It was very fresh track, having been made after rainy weather. We could tell that it was—the group was walking at nighttime and that they would go into an obstacle before making a change to go around an obstacle. They would cross over mole hills or ground squirrel hills, causing themselves to sink down quite deeply, where had it been daylight they would have avoided going across these.

[16] Q Did they run into any fences?

A No, sir, not into, but into brush or cactus they would walk into it making the change maybe right at the obstacle itself, instead of some distance ahead.

Q What else did you notice? Did you notice any rest stops—

THE COURT: Excuse me, am I getting the impression all of these footmarks were—had the same chevron type—

THE WITNESS: No, sir, no, sir, only one of that type in the group. The others were combinations of tennis shoes, I can't recall all of the other particular tracks.

THE COURT: But there was only one showing the chevron marks?

THE WITNESS: Yes, sir.

Q And did you notice anything in particular about where that set of footprints might proceed as opposed to the others? In other words, was there anything in particular about it and the way it was placed on the ground in relation to the other tracks you saw?

A In the instance where it appeared we had a single file walking, it would appear to have been the lead track. This by the amount of track which would knock portions of it off, and we would have to wait until we'd get the fanning effect to again get the full print of the chevron [17] track itself.

Q Were there any—was there any indication from this sign there were any rests made?

A No, sir.

Q How could you tell if there had been?

A If there had been a rest made in that fresh a ground, you could have seen where sitting down had occurred. There would be a change in the direction of the track in that you would get some milling around of tracks. It wouldn't be directional.

Q You saw no such signs?

A No, sir. Plus you would have the debris of having snacked or what have you.

Q Did you see any sign that they had taken any what might be called a comfort break or stop?

A No, sir.

Q Did you find that to be unusual?

A Yes, sir, we did. Most normally you'll get your walking periods and sets of four to six hours, then you'll have a rest stop.

Q Was there any sign of any human elimination along the way?

THE COURT: Isn't that what you meant by confort break?

MR. MUELLER: Yes, sir, I didn't know if—

[18] THE WITNESS: No, sir.

Q (By Mr. Mueller) Okay. When you were making or trailing this one set of tracks did you notice any other tracks, groups of tracks?

A This track paralleled and even criss-crossed a group that had been made some three to four days prior to this particular track. It was difficult to time the other track, as since it had been made rain had fallen upon it.

Q Did you notice anything or notice any tracks among that group?

A Agent Gray and I discussed that the chevron track had been with the older group as well.

THE COURT: The question was did you notice any chevron markings in the other group.

THE WITNESS: Yes.

THE COURT: Yes.

Q (By Mr. Mueller) You saw the chevron mark?

A Yes.

Q Now, you say you followed this set of tracks for how far?

THE COURT: 22 miles.

THE WITNESS: About 22 miles, sir.

Q (By Mr. Mueller) Do you have any way of estimating how fast these people may have been walking?

[19] A We're trained and we find that the rule of thumb is that they'll maintain a pace of from two and a half to three miles an hour.

Q And how long would it take the group to travel this distance from the border following this trail?

THE COURT: Well, let's divide that ourselves and say it was about three into twenty-two and see what happens.

THE WITNESS: Well, sir, we'd have to add back the time, the four miles that I was from the border itself.

THE COURT: Well, the question was how long it would take them to travel 22 miles or from the border.

MR. MULLER: From the border to the highway, do you have an estimate of that?

THE WITNESS: I would say eight to twelve hours, sir.

Q (By Mr. Mueller) Now, calling your attention to the highway, was this Highway 86 on the Papago Reservation?

A Yes, sir.

Q What Milepost did they intersect?

A They arrived at the highway at Milepost 119 and paralleled it on down to Milepost 122.

Q What direction of travel would they have been going in from 119 to 122?

A Eastward.

[20] Q How far from the highway were these tracks?

A That varies, as the brushline which divides their walking and the highway it would vary from fifty yards to seventy-five yeards.

Q During daylight hours could they have been seen from the highway?

A In daylight they could have, yes.

Q What kinds of growth was there along the path they took along the highway?

A Broken mesquite brush, palo verde brush, ironwood. Not a consistent belt, but patches that would be with clear spots.

Q And Agent Wayne Gray was with you along this entire route?

A Yes, sir.

Q Did you notice anything about—well, what happened about Milepost 122, let's put it that way.

THE COURT: Milepost 122?

Q (By Mr. Mueller) Did you say Milepost 122 was the last milepost?

A Yes, this particular day.

THE COURT: I'm sorry, does 122 mean a hundred and twenty-two miles?

THE WITNESS: No, sir, that Milepost 122 is off of the port of entry down at Lukeville, Arizona. That's [21] where that milepost comes from. It has nothing to do in relation with the borderline—

THE COURT: I'm confused then, when you say they appeared to parallel the Route 86 for a period of miles and they finally entered the highway at Milepost 22 or Milepost 122?

A THE WITNESS: At Milepost 122 they left the brush, walked up on the pavement of the highway itself.

THE COURT: Thank you.

THE WITNESS: We covered—I don't recall the exact amount, but we kept making circles on either side of the highway to try to get the tracks started again off the highway.

Q Beginning at Milepost 122?

A Yes, sir. We went up to Milepost 125. I do know that because we were picked up at Milepost 125.

Q Did you locate or pick up these tracks again on any side of the highway within two or three miles?

A No, sir, we did not.

Q From that what did you infer?

A We felt that the group had been picked up and ended our operation from that point.

Q Okay. Calling your attention again to Exhibit 2 for identification. Does that have represented on it anything

that indicates this general trail that you tracked [22] on the 16th?

A Yes, it has a dotted line, which would indicate the path, roughly the path that we had followed the group of illegal aliens.

Q Would you pick that up and indicate to the Court what you just said?

THE COURT: You know one of the things that's missing and I suppose I'll learn about it, was, or is, that this dotted line or path or whatever it is, there's going to be some proof they were made by some aliens entering the country illegally.

THE WITNESS: Well, where Agent Gray—

THE COURT: No, I was addressing myself to the lawyer.

MR. MUELLER: There is—

THE COURT: Assuming what the agent says is correct, the only thing that's missing is that the prints were made by aliens entering into the country illegally and evidently picked up somewhere on the highway.

MR. MUELLER: Well, this relates to prior experience and knowledge.

THE COURT: Yes, in tracking.

MR. MUELLER: And tracking, but he—

THE COURT: But he keeps adding tracking illegal aliens.

[23] MR. MUELLER: Okay.

Q Would you relate to us the basis for your conclusion as to these being tracks of illegal aliens?

A Previously any group that we would track like this covering this much distance, having crossed travelled roads yet not using a travelled road, upon catching—tracking up to people, we've always found that they were illegal aliens.

Q Is this—

A This area is heavily used by illegal aliens. Not the particular route itself, but the general area.

Q What do you mean by "general area"?

A From the Baboquivari Mountains where they go down to the Mexico borderline.

Q Are they shown, the Baboquivari Mountains, on the chart there?

A Yes, sir, they are, all the way to the La Lezna Mountains.

Q To the west of the Baboquivari?

A Yes, the La Lezna Mountains aren't on the map, it's some distance.

Q What kind of area is that?

A It's all desert area spotted with mountains.

Q What degree of population is there in that area?

A Very very low degree of population outside of [24] Sells proper, Sells itself.

Q Sells is up on the highway, is it not?

A Sells is the main village for the Indian reservation.

Q But down near the border are there any villages down there?

A There are a few villages which would have some two families, some only one family, some up to eight families living at the village.

Q And on how many occasions based on your prior experience have you tracked similar tracks which resulted in finding illegal aliens?

A When assigned to sign cutting operations, on a daily basis, maybe three to four groups daily, depending on how much time it takes to complete one tracking operation, whether or not you would go to a second or third or fourth operation.

Q Can you estimate how many times you've done that in your career of eight years in the Tucson area with the Border Patrol?

A Line watches are primary spots, our tracking opera-

tions come within line watch. They schedule us to maintain about seventy-five percent line watch operations. I don't think I could accurately make that—any kind of an estimate on that.

[25] Q Can you give us a general total estimate of how many times you've done that? In other words, track and located aliens.

A It would be over a thousand times, sir.

Q You personally?

A Yes.

Q Okay. Would you point out to the Court the trail that you followed, if it is indicated on that chart, on the 16th of January?

A It would be this dotted line. I began off of Itak Road a short distance south of Itak Road, followed the track on up to 119, paralleled the road to 122 where we lost the track. The mile marker being right at the area where we lost the track.

Q Is there any name given to that dotted line on the chart?

A Name?

Q Yes. I notice I think a red line there that seems to be given a name of Highway 86.

A Well, we have Highway 86,—the top line being Highway 86—

Q Describe the features on that chart, if you will.

A The top line is Highway 86, runs from Tucson down to Ajo. From Sells, the next road we have is the San Miguel Road that runs down to the border, where that's [26] a wire gap gate on the border. The large drawing here is the Baboquivari Mountains.

Q This is south of Highway 86 to the border?

A Yes, sir.

Q And it's on the right-hand side of the chart?

A Yes, sir.

Q Almost near the center of the right side?

A Yes, sir, this large—the larger mountain drawing.

Q What else do you have shown on there?

A We have the Highway 286 which goes down to the port of entry at Sasabe, Arizona.

Q Where is that is relation to the other.

A That's to the far south. It's this road marked here.

Q To the east of the Baboquivari Mountain area?

A Yes, sir. This bottom line being the International border.

Q It's diagonal to the bottom of the chart?

A Yes, sir.

Q All right. On that black dotted line would you mark in with your pencil or pen the chevron trail, if you will? Is that the trail where you saw the chevron marking?

A The dotted line would have to run fairly accurate to the track we did on January the 16th, the group we [27] followed would have taken that path.

Q Okay, would you mark that then the chevron trail, just alongside of the line like you've done with the highway.

THE COURT: I wonder, is that necessary? He said it's the dotted line. It's the only dotted line on the thing.

MR. RINALDI: Is it a black line or red line?

MR. MUELLER: Black dotted line.

THE WITNESS: It's black. It's separate from the other.

MR. MUELLER: Well, we won't mark it any different.

Your Honor, I would move to admit this in evidence for illustrative purposes.

THE COURT: I don't know whether Counsel has seen it. Show it to him.

MR. RINALDI: I would object to the relevancy of the thing even for illustrative purposes since the arrest was on the 31st of January and all this relates to something that occurred on the 16th of January.

MR. MUELLER: I'll avow that I'll connect it up.

THE COURT: Receive it, Exhibit 2, with exception to Counsel.

MR. MUELLER: That's all I have of this witness, your Honor.

[28] THE COURT: Cross.

CROSS EXAMINATION

By MR. VELASCO:

Q Agent Rayburn, on that diagram could you indicate where the La—

A La Lezna Mountains?

Q Yes, would you indicate where those are? Would they be at the edge—

A Shall I draw where they would be?

Q Yes, would you please?

A The La Lezna are mostly in Mexico.

Q And how far is it from that mountain range to the other mountain range you've indicated?

A I don't know, sir. There are no roads to—

Q You don't know what the distance is?

A To measure that distance.

Q Can you estimate what the distance is?

A You want me—want the distance from the Baboquivari Mountains to the La Lezna Mountains?

Q Yes.

A May I use the port of Sasabe for a point of reference?

Q Sure.

A From the point of Sasabe to the La Lezna would [29] be about eighteen miles.

Q And from Sasabe to the Baboquivaris would be about how far?

A About four miles.

Q So it's a distance of about 22 miles?

A Four to five miles. Sir?

Q It's a distance of about 22 miles?

A No, sir, I took the distance from the port of Sasabe to La Leznas would be about 19, so from the mountains themselves would be about fourteen miles.

Q And you indicate that on a previous occasion you had assisted the Casa Grande sector?

A Yes.

Q Is the Casa Grande sector on that map, sir?

A The Casa Grande Border Patrol station was working out of the Sells trailer, it's a Border Patrol trailer at Sells. They were on a catch detail down there.

Q How far away is the Casa Grande sector?

A Casa Grande station?

Q Yes.

A I don't know, sir. I think it would be about 85 miles.

[30] Q 85 miles?

A Yes.

Q And this area around Sells, is that part of the Tucson sector?

A As of February, yes, sir.

Q As of February it is?

A Yes, sir.

Q And previously it used to be the Casa Grande sector?

A Station.

Q And are you assigned to the Tucson sector or Casa Grande sector?

A I'm assigned to the Tucson station.

Q And have you interchanged with the Casa Grande station?

A We worked or assisted Casa Grande with the Reservation area since I've been in the Border Patrol.

Q For those eight years?

A Yes.

Q You indicated earlier that the distance—that that area in-between those ranges, those two mountain ranges is frequently used by smugglers, is that correct, or aliens?

A Yes.

Q Or you believe it's used by aliens?

[31] A Yes.

Q Isn't that in fact true from almost all of the border from Lukeville to Douglas?

A Yes, sir, it is.

Q And you say that there are—Sells is the main village in that area, about how many villages are there in-between those mountain ranges and south of Highway 86?

A How many?

Q Yes.

A In the entire area, sir?

Q In that 22-mile area.

A They have a small village at San Miguel which is—

Q Just give me an estimate of how many of those you believe there are there.

A About five.

Q Five in all? And does that include the total amount of inhabitants in the area or are there just one house dwellings here and there or one family dwellings?

A No, sir, there will be some unoccupied dwellings in a village. I wouldn't have the figure there that you're asking for.

Q The Casa Grande unit that first found the chevron, do you know where they found that chevron?

A When they first found it? No, sir, I do not.

[32] Q And you don't know where they found it, either, do you?

A No, sir.

Q And so the only information you have is that prior to January 16th somebody had seen a chevron track among other tracks?

A I had been involved in discussions on tracking on the Reservation which also discussed this track having occurred January the 3rd or 4th, also.

Q And do you know where that was?

A Yes, sir, basically the same route.

Q Same route or the same area?

A The same route, sir.

Q The same route, too? You're saying the only people that used that route had a chevron track with it?

A This particular one route, from descriptions we were being given by one another, always had the chevron track present. If it went to this point where it paralleled 86 from the one nineteen area to 122, yes, sir.

Q So we're talking about that three mile—you're talking about that three-mile space?

A No, sir, I'm talking about where—as this path is drawn, it was repetitious that this would be—the chevron track would be with the group coming along this path.

[33] Q And that's based on information you believe you heard on the 3rd of January and 16th of January?

A On the 16th I was there.

Q You saw it on the 16th, heard about it on the 3rd of January?

A Well, in-between those two dates, that a group had been followed on the 3rd or 4th of January date. I don't recall what date exactly, I just know it was right after the first of the year.

Q Am I correct in assuming that all you have ever gathered from that trail is simple tracks. You've never stopped anybody, have you?

A No, sir, we had not.

Q And you've never been able to determine how many people or who these people were, have you?

MR. MUELLER: Your Honor, I object to this as to points of time as to identifying who these people were.

Q (By Mr. Velasco) From the 16th back. Let me ask you this: From the 16th back did you apprehend any people on the route?

A The Casa Grande agents had apprehended a group of illegal aliens. It was from this apprehension that they took their drawing. On the name—they had a name listed on the drawing of the chevron track, this name was Pedro Hernandez-Loera.

[34] Q Do you know where they picked up that track?

A I could not recall the exact spot where this apprehension had been made.

Q So the information you have available to you is such that no one's ever been apprehended on that particular trail, isn't that correct?

A I don't recall, sir.

Q Is that particular area in your line cutting duties, do you always inspect that particular route?

A After we establish a pattern of this nature, then we would, in order to try to save time, go to something of this nature. We would try to go to this point to minimize the amount of time we have to spend searching for track.

Q Did you go to that point every day?

A There for—no, sir, I did not.

Q Did someone go to that point every day?

A No, sir.

THE WITNESS: At that time—

THE COURT: No, my question was, Counsel established that nobody went every day. My question was did somebody go frequently?

THE WITNESS: Frequently, yes.

[35] Q (By Mr. Velasco) When you say frequently, does that mean five times a week, four times a week?

A The Casa Grande agents would go as they were detailed to the Sells area. We would go as we were assigned.

We would not be assigned to the area five days in the week, because our assignments were only to assist their station is filling the gap.

Q So you don't know what the number of times people would go there?

A No, sir.

Q In your detail how many times did they go there?

A We were merely assigned on a daily basis, sir. Not on a detail basis.

Q How many times did you personally go down there?

A To the one particular trail?

Q Yes.

A This one day, January the 16th.

Q Were the people—were the tracks that you found always fresh? Were they very fresh that day?

A The group that we chose to track were very fresh, yes, sir.

Q Are you saying there were other groups of tracks there?

A Yes, sir.

Q Did they go in the same direction or different [36] direction?

A Exact same direction.

Q Exact same direction, and were these tracks of people who appeared to be travelling without any luggage or without—were the tracks deep or where they light or what?

A That would depend on the terrain. As we went into harsh terrain, the tracks would be light. As we went through sandy washes, it would be deep.

Q Did it appear to you these people were carrying anything of any substance?

A No, sir.

Mr. VELASCO: I have no other questions.

CROSS EXAMINATION

BY MR. RINALDI:

Q Did you ever fill out any written report in reference to this?

A Yes, sir.

Q So just to recap your testimony, at some point in December someone indicated to you that there had been signs of a chevron shoe in the area of Sells, is that correct?

A That's when they brought the sign to this particular route.

[37] Q And you didn't know where the sign had been picked up or who had picked it up, but you had just been advised to be on the lookout for it?

A Yes.

Q Is that accurate? Then on January 4th, about that time, you were advised a second time that they had seen the chevron again?

A After January the 4th.

Q Okay, did they advise you of the specific time or place they had seen the chevron the second time?

A The specific place I was told. I think they had gone backwards on this track to establish exact place of entry.

Q And do you recall who told you that?

A Agent Gray and one of our pilots.

Q And then on January the 16th you actually saw the track?

A Yes, sir.

Q So that you actually had three occasions in which you had either discussions or actual visual contact with the track?

A More than three.

Q Well, prior to the 16th?

A More than three prior to the 16th.

Q What were the other occasions?

[38] A This had—in groups, this particular track had been discussed quite a bit. We discussed things like it appeared that we had one night journeys, for instance, things of that nature.

Q Did it ever occur to you there might be more than one pair of shoes like that since the track was so prevalent?

A Another thing that had been pointed out to us—

THE COURT: No, the question was, Counsel wanted to know, don't you think—did you come to any conclusion that it was more than one pair of shoes? Was that the question?

THE WITNESS: I felt that it was one pair of shoes reoccurring.

THE COURT: Although you had allowed the possibility that it could be more than one?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) On the 16th, you say that the tracks were fairly fresh, is that correct?

A Yes, sir.

Q Can you tell within two or three hours or—what time frame can you tell on tracks? I mean, how close can you pin it down if I walk through a vacant lot at 2:00 o'clock in the afternoon, and you come by at 6:00, can you tell if it's four hours? How accurate can [39] you be on that stuff?

A You can be extremely accurate after following and establishing a walking pattern. This accuracy can be increased if you can weed out the possibility of night walking, limiting the track to day, then knowing the time of day, you're on the track.

Q Now, you saw the track on the 16th of January?

A Yes, sir.

Q And approximately what time did you first run into it?

A Early morning.

Q Okay. And at that point in time were you able to determine how old the track was?

A We felt it had been made the night before.

Q In other words, within the previous twelve hours or so?

A Yes, sir.

Q Could it have been within the previous 36 hours?

A No, sir.

Q Now, you indicated that the reason you could tell that the chevron was probably the lead track is because other tracks would track over it, the people following behind.

A With partially—well, some points totally track over, some points partially. You'd have to have a fan go [40] go out before—

Q But you couldn't be absolutely certain that was the lead person, I mean he could have been the second or third or fourth person?

A Yes.

Q In a group of ten or fifteen people, is that correct?

A That is correct, sir.

Q So there could have been other people actually leading the parade, couldn't there?

A Yes, sir.

Q Did you ever—what kind of training have you had in tracking sir? Did you ever go to school or anything or is this just all on-the-job training?

A We're trained by—as we first come in, by other journeymen agents. The only way to train for tracking is trial and error.

Q And so your entire experience or your entire knowledge is based upon the experience you've had in eight years out in the field?

A Yes, sir.

Q Were you able to ascertain on January the 16th what time the individuals whose tracks you saw had—well, first

of all did you track the tracks back to determine where they had entered the border?

[41] A Agent Gray had begun the track from the border area.

Q Oh, and you picked it up—

A I joined Agent Gray—

Q Was Agent Gray or you ever able to determine what time those tracks had actually crossed the border?

A I think we pretty well knew it would have been late evening, possibly just at sundown.

Q Is it possible they could have crossed at 2:00 in the afternoon?

A I don't think so, because immediately after he began the track he commented that it appeared they were not moving at nighttime.

Q You mean because they were walking into obstacles?

A Not hitting the obstacles but making their change much too close to the obstacle.

Q Now, after you tracked them up to Highway 18—I mean up the highway—they reached the highway at approximately 118, is that correct?

A 119.

Q Then they walked about three miles to Milepost 122, is that correct?

A Yes, sir.

Q Then the tracks were suddenly lost?

A The tracks made a drastic turn, they were going [42] east parallel to the highway, then they turned directly north walking straight to the highway, up the berm of the roadside into the pavement.

Q When you reached the pavement what, if anything, did you notice about the pavement or anything on the pavement? Did you see any additional tracks there?

A Not on the pavement, no, sir.

Q Did you check both sides of the road to determine whether they crossed over to the other side of the road?

A Yes, sir, we did.

Q And they hadn't gone on?

A No, sir.

Q So you concluded from that they were picked up by some vehicle?

A Yes.

Q Did you find any debris or anything that would suggest the kind of vehicle?

A No, sir.

Q So would you agree with me then the vehicle could have either gone on to Ajo or Casa Granda after picking them up or it could have gone on to Tucson?

A Could have gone either way, sir.

Q You have no way of knowing which way it did in fact, though, do you?

A No, sir.

[43] Q Now, would you sort of elaborate for the Court where this area is in relation to Casa Grande on the map? Where would Casa Grande be on this map, approximately?

A Off of it. We'd have a junction here, have Route 15 coming out of this Quijotoa. This highway of course would continue on. This runs on up into Casa Grande, continues on the Reservation, runs up to Casa Grande, which would be roughly up in here.

Q Okay, do you know how far it is from Sells to Casa Grande?

A No, sir, I don't.

Q Do you know how far it is from Casa Grande to this junction here?

A No, sir, I don't.

Q Is this map to scale that you have here?

A I don't believe so.

Q In fact isn't the Casa Grande function just a few miles out of Sells?

A No, sir.

Q Approximately how many?

A This is Milepost 98, roughly. Here we are right at Milepost 114, roughly.

Q So it's about 16 miles from Sells to the Casa Grande junction?

A To this Quijotoa.

[44] Q And from the pickup point it would be about 24 miles to the Casa Grande junction, to Quijotoa?

A Yes.

Q From Quijotoa to Casa Grande you have no estimate as to how far that distance is?

A I don't know, sir.

Q But this is an all-purpose road that leads straight up to Casa Grande from Quijotoa?

A Yes.

Q From Casa Grande there's a straight highway or the I-10 straight to Phoenix, isn't it?

A Yes.

Q Did you ever see on January the 31st, prior to arresting Mr. Loera here—

THE COURT: You're a little bit beyond yourself, I think. It's a little bit beyond the direct, Counsel.

Q (By Mr. Rinaldi) Now, you've indicated that you've tracked aliens in this area a great deal, is that correct?

A Yes.

THE COURT: Tracked aliens, did he say? Have you tracked them?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) Excuse me, I'll withdraw the question and the answer.

[45] THE COURT: The witness agreed with you anyway.

Q (By Mr. Rinaldi) You've tracked individuals in this area?

A Yes.

Q Okay, would you agree with me by looking at the footprints you can not determine whether it's a Mexican alien, an American citizen or Papago Indian?

A No, sir.

THE COURT: He said he would not agree?

THE WITNESS: I do not agree.

Q (By Mr. Rinaldi) You do not agree. You can by looking at the footprints themselves tell the type of person that's wearing the shoes, is that correct?

A By following, by tracking, we can, yes, sir.

Q Would you elaborate on that then?

A The way of life in the country of Mexico is to walk. They have a much much stronger walking pattern than what would be a United States citizen. I think we're—

Q Do Papago Indians walk a lot?

A No, sir.

MR. MUELLER: Your Honor, I object. He's interrupting the answers.

MR. RINALDI: I thought he was finished.

Q Did you want to say something else?

THE COURT: You were about to explain how it is [46] that you can tell from the foot tracks the type of individual who made them. You said Mexicans have a much stronger mark, is it, or much stronger what?

A Well, their durability for walking great distances is much better than ours.

THE COURT: But fill me in as to what you said. The Mexicans had a much stronger what, impression, is it?

THE WITNESS: Walking pattern, sir, the overall pattern.

THE COURT: How about Papagos? Had you finished then what you started?

THE WITNESS: No, sir. I was going to point out that often in these groups we'll see tennis shoes, it's not a common walking shoe. We'll see the Wawache tread, which is a tire tread or sidewall of a tire. The type of track

left is often how you establish you have illegal aliens moving.

THE COURT: Are you finished?

THE WITNESS: Yes, sir.

THE COURT: Next question, please.

Q (By Mr. Rinaldi) Did you see any Wawaches in this group you were tracking?

A I do not recall exactly.

THE COURT: See any what?

Q MR. RINALDI: Wawaches.

[47] Q In addition to this trail you described are there other trails in the area?

A Yes, sir.

Q And they roughly run parallel to the trail you're describing now?

A Yes, sir.

Q You mean they traverse from the border up to the highway?

A Yes, sir.

Q And just finally, you arrested no one on January 16, is that correct?

THE COURT: Did you arrest anyone on January 16?

THE WITNESS: Yes, sir.

THE COURT: He said he did. Next question.

Q (By Mr. Rinaldi) In reference to this tracking?

A No, sir.

MR. RINALDI: Thank you.

THE COURT: That's all, gentlemen?

MR. MUELLER: No, I have some questions.

REDIRECT EXAMINATION

BY MR. MUELLER:

Q With reference to the arrest you just mentioned, what was that, you said you had made some arrests?

A January the 16th?

[48] Q No, prior to that.

THE COURT: No, the question was: Did you arrest anyone on January the 16th, expecting the answer to be no, but the answer came in yes.

Q (By Mr. Mueller) Was someone arrested on January the 16th?

A Yes, sir.

MR. RINALDI: I object to the materiality of this.

THE COURT: No, you asked the question, Counsel, you opened the door wide open, left it open.

Q (By Mr. Mueller) Would you relate what you mean?

A No, sir.

Q Would you tell us what you mean by there being an arrest on the 16th?

A After we stopped the operation and were returning to Tucson, we arrested three illegal aliens just out of Tucson.

Q That was not to your knowledge related to those tracks you had been—

A No, sir, it was not.

Q Okay, previously, you said that you had knowledge of certain circumstances of the Border Patrol getting the name of Hernandez-Loera and being able to duplicate this track. On a piece of paper?

A Yes, sir.

[49] Q A drawing of the track on a piece of paper. Would you relate to us how they got that information?

MR. VELASCO: Your Honor, that's beyond the scope of cross.

THE COURT: I think so, too, but I think it was brought out on Mr. Velasco's testimony. It wasn't your cross, obviously, but it was the other man, the other defendant's counsel. You may tell us.

Q (By Mr. Mueller) Would you tell us what the basis of that information was or source of that information or incident that caused that information to come about?

A It was from an apprehension that the Casa Grande Border Patrol agents had made. The apprehension had actually been made by Sells law and order. The aliens and Mr. Hernandez had been turned over to the Casa Grande agents, and in interviewing the illegal aliens they had pointed out Mr. Hernandez as the guide.

Q As the guide?

A Yes, sir.

Q And was prosecution declined on that case?

A Yes.

Q And at that time did they actually observe this boot or shoe print?

A Yes, sir.

MR. RINALDI: Objection, your Honor.

[50] THE COURT: It sounded like an objection.

MR. RINALDI: Yeah, I don't know how he could tell what they observed or didn't observe.

THE COURT: Maybe you haven't got the skill, but in time you might learn it, I don't know how you can tell. That was the question, wasn't it, how you could tell?

MR. RINALDI: My objection was how he could tell what they observed, what they observed was peculiar to that knowledge.

THE COURT: You didn't make that objection. All right, next question.

Q (By Mr. Mueller) You were asked whether you could conclude whether this was one track or several people walking with the same type of sole on their shoe. I believe you stated you concluded it was only one track. Why could you conclude that? In other words, why could you conclude it was only one person?

A Well, the size of the print in itself was larger than normal. The illegal alien shoe size averages around a size

seven or eight. This appeared to be larger. This was a twelve-inch track was made, as we could measure it. It's not a—it was an uncommon track.

Q Did the amount of—well, strike that.

You also stated that you could determine the age of the tracks that you saw on the 16th, at least the most [51] recent set, to have been made in the last twelve hours but not the last 36. How could you determine that? In other words, how could you tell they had only been recently made?

A Because only a few days before we were on this operation, we had had only a short period of time before we had light rains in the area. This track had been over any rain.

Q What do you mean by "over any rain"?

A It had been made since the rain had stopped.

Q Well, on that same day, on the 16th, you said you saw this one fresh set of tracks and then there was another one you estimated to have been made three or four days before that, is that correct?

A Somewhere. We could not tell you how old the other track was, but it had been made before the rain.

Q Now, you were asked by Mr. Rinaldi whether you knew which way the vehicle went after picking up the aliens. Did you—for sure, I mean you couldn't absolutely say for sure. But did the direction of travel of the tracks themselves, in other words, I think you testified in an easterly direction, suggest anything to you as to which direction the vehicle may have been—

THE COURT: The question was whether he knew, the witness said he couldn't tell, but what inference he [52] could draw from the track I don't think would help us.

Q (By Mr. Mueller) From Milepost 121 or 122 on Highway 86, how far is it from there to Interstate 10 near Tucson? Do you know the distance, would you be able to give us the distance?

A It's about 40—right at 50 miles.

Q Is it less mileage from—at Milepost 122 to that point on I-10, closer to go that way than it would be to go to Casa Grande and get onto I-10?

MR. VELASCO: Objection, closer to where, your Honor?

THE COURT: I have no idea.

Q (By Mr. Mueller) Less mileage.

A Yes.

MR. RINALDI: Let's ask him if he knows first, he didn't seem to know previously.

THE COURT: You want my robe? You want to wear the robe?

MR. RINALDI: I'm objecting.

THE COURT: You're not objecting at all, you're spouting, spouting off like it was a debating society.

Next question please.

MR. RINALDI: Was there an answer to that question, your Honor, I was speaking and I must have missed it.

THE COURT: Next question, Mr. Mueller.

[53] Q (By Mr. Mueller) You said that there were other trails in the area similar to this trail. How close are they to this particular trail? In other words, describe to us what you meant by this area and these other trails you said went from the border to the highway.

A Well, between the San Miguel Road and the Baboquivaris itself is the heaviest entry area. These aliens walk in a northerly direction up and cross Highway 86. We get a funneling effect from the Baboquivari Mountains in that the mountain area, the Spotted Mountains near the Sells area causes a kind of funneling effect down into the northern Iguirre Valley.

Q So what area—how many miles is it across this valley you've just described, approximately?

A It's around 14 to 16 miles and it drops down to about eight miles in some places.

Q And these other trails in this, you described, were in that 14 mile span?

A Yes, sir.

Q And you weren't referring to another trail say 50 yards from this particular trail you tracked on January 16. In other words, these other trails which you were talking to Defense Counsel.

A No, sir.

Q Mr. Rinaldi or Mr. Velasco asked you how many [54] villages there were. You said there were about five in that valley area, is that correct?

A I took Mr. Velasco to mean in the San Miguel Highway area or the Alverez Mountain area, and I would say about five.

Q And in those villages in total, how many people would you estimate there are living?

A I couldn't say, sir. Not very many.

Q Couldn't even give a general estimate?

A No.

Q Ten to a hundred or two hundred to a thousand?

A Under a hundred.

Q Now, on January 16 you said you were working with Agent Wayne Gray. Did you relate some of the prior information you had that you had obtained in December 1976?

A Just the description of the track, the general area that it would arrive at Highway 86. While tracking it on the 16th, Agent Gray again went over—

MR. VELASCO: Objection, your Honor. It's beyond the scope of the questions.

THE COURT: Yes, it is.

Q (By Mr. Mueller) Did Agent Gray relate anything to you about his prior experience?

A Yes, sir, he—

Q When did he have prior experience?

[55] MR. RINALDI: Just a second, objection.

THE COURT: Yes, Counsel, this is beyond—you're now on redirect.

MR. MUELLER: That's all I have. Thank you.

THE COURT: That's all, gentlemen?

Thank you, sir. You may step down.

MR. MUELLER: Your Honor, may this witness be excused? He's under subpoena in Superior Court for a trial, I believe it is, that started at 9:00.

THE COURT: I would think so, yes.

MR. MUELLER: Agent Gray.

WAYNE GRAY,

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q Would you state your name, please?

A Wayne Gray.

Q Your occupation?

A U.S. Border Patrol agent.

Q How long have you been with the Border Patrol?

A A little over three years now.

Q And did you have any law enforcement experience [56] prior to that?

A Yes, sir, I worked for a year on the City Police in Hobbs, New Mexico.

Q Have you been stationed in the Tucson sector all the time you've been with the Border Patrol?

A Yes, sir, I have.

Q And were you on duty—well, strike that.

I'd like to have you see a photograph that's in front of you on the stand. Do you see it there?

A Yes, sir.

Q Do you recognize what's shown in the photograph?

A Yes, sir, I do.

Q What do you recognize?

A It's a print that—that is like a print we have been following in the Babequivari Valley for quite some time.

Q Have you seen that pattern of shoe print before in the field?

A Yes, sir, I have.

Q When was the first time you saw it?

A The first time I saw it is on January the 4th, I believe, this year.

Q January 4th of 1977?

A Yes, sir, that is correct.

Q And would you tell us where you were when you saw it? Where did you first see it? Where was it?

[57] A The first time I encountered this type print was at approximately Milepost 119 at the little—what we call the Little Tucson Cattle Guard near Highway 86. At this point was the first time I saw this print, and I followed this print to Milepost 122.

Q Is this area shown on the chart in front of you marked Government's Exhibit 2?

A Yes, sir, it is.

Q Is the cattle guard shown on there?

A No, sir. The area of the cattle guard is, but—

Q Do you have a pencil with you?

A Yes, sir, I do.

Q Or a pen? Would you mark the location of the cattle guard?

MR. VELASCO: Could I approach the witness and see where he's marking?

THE COURT: Of course.

(By Mr. Mueller) Would you mark just above it here where I've placed a line and an arrow "cattle guard".

A Okay.

Q Describe to the Court what you did and what you observed on January 4th?

A Well, on January the 3rd—

Q First of all, you might want to tell us what you were doing out there and why you were there.

[58] A On January the 3rd, Pilot Akin came into the office and advised—

Q Which office are you talking about?

A At the Tucson Border Patrol office. And advised that—correction on that. On the 4th, the morning of the 4th, he requested help from the Tucson agents because on the prior day, the 3rd, they had followed a set of tan tracks, one with this type marking in it, and they had to abandon the tracks due to darkness somewhere south of this Little Tucson area. We went out—

Q Is the Little Tucson area on that chart?

A The general area, yes, sir.

Q Are the words "Little Tucson" on it?

A Yes, sir, it is.

Myself and Officer Doug Hunter went out to help the Casa Grande men and here, Pilot Akins, and he flew a general line of where the tracks were going, and we cut for the sign around this cattle guard around Milepost, it's right at 119, and that's where we initially found the tracks and started on the tracks from there.

Q What do you mean by "initially found them"?

A That's where we observed—first observed the tracks that they had described to us.

Q Tell us what you did and what you saw?

A We followed this group and observed that it was [59] staying just south of the highway and paralleling the highway in an eastward direction. Therefore, after, instead of walking the whole distance, we tried jumping ahead from sandwash to sandwash, and each time that we found the tracks then we would continue on to the next sandwash.

At approximately Milepost 122, I don't recall the exact place, but I was following the sign because it wasn't where we thought it should be. I was following it on foot and I also saw some old prints with this type of shoe marking in it.

Q What do you mean by "this type of shoe marking"?

A With this print design in the sole.

Q Would it help you if you referred to it as a chevron print?

A Yes, sir, it would. That's what we—some of the agents, including myself, referred to this man as Chevron, or as this, his print as the chevron print.

Q Go ahead and relate it.

A I didn't pay a whole lot of attention to this older group, other than the fact that this print was in it, but I did follow the other sign to a point where it came out at Milepost 122—

THE COURT: You followed the old prints until it came out at 122?

THE WITNESS: No, sir, this would be the freshest [60] sign that we had, that the Casa Grande units had had the previous day. At Milepost 122 the tracks led on to the highway. We cut for some distance both sides of the highway to make sure that they didn't go on across, and we couldn't find any evidence that this had happened, therefore we assumed that they had been picked up on the highway.

Q Okay. Was there any sign the men had been hiding or stopped in that area?

A No, sir, there had not been. At one point I followed I would guess about a mile on foot, and at any part of this time there was no sign of stopping.

Q How far off the highway were these tracks? In other words, how far from the highway parallel or the edge of the highway?

A From the highway itself I would guess about 50 or 60 yards, something around that area.

Q Could people walking at that distance from the highway have been seen from the highway during daylight hours?

A Yes, sir, very easy.

Q Based on what you saw from the tracks and how they were made, did you make a determination they were made during the daylight or during the darkness?

A Yes, sir. Our experience with aliens is for one thing that they will not walk that close to the highway [61] where they can be observed. Also while following this sign, it would come upon brush and gopher holes and things like that where they would immediately make a —sometimes even backing up to a slight extent and going around objects which we determined that this was being done in the nighttime hours, in the dark hours.

Q Why does that mean that to you?

A That these people on this particular day, we determined that they were being picked up in the dark hours?

Q Why did it mean—why did them coming up to something and abruptly going around it mean this was done during the darkness?

A Normal walking habits of people, in daylight hours they can see far enough in advance any object that's going to be in their way, therefore they more or less have a straight walk or more of a curved type to their walk around objects instead of abrupt changes.

Q Could you—did you notice where they had crossed any fences, any obstacles?

A On the 4th, no, sir, the only fence I observed that they crossed would be the fence between the highway and the—of where they were walking paralleling the highway.

Q Could you determine with regard to the old set you say you saw and the new set of tracks how many people [62] would be in the group, if there was a group?

A In the old set, sir?

Q Both sets.

A In the new set there was a group—it was ten. In the older set I didn't spend that much time with it, but I guessed about seven to eleven, somewhere along in there.

Q Did you make any estimates as to how long ago the new set and the old set had been made?

A Approximately a week, the older set.

Q What about the new set?

A It appeared to be a day or two old at this time, on the 4th.

Q The 4th was a what, a Tuesday?

A Yes, sir, I believe it was.

Q On the 4th had you received any information as to any point of origin of these tracks in the United States?

A Yes, sir. Later the Casa Grande unit and Pilot Akins and myself and my partner met at our trailer house which we have at Sells in the parking lot of Sells Law and Order, and in general discussion there we talked about this chevron and they advised that it was entering south of an Indian village called Itak.

Q Now, you described the prints that you followed which paralleled the highway going east for a few miles. [63] Did that mean anything to you or was there any significance to that to you with regard to your prior knowledge about techniques used by alien smugglers?

A Yes, sir. I had heard also of other—I didn't know at this time if this was—that this chevron involved in this type of operation or not, but I had heard of the aliens walking parallel to the highway until such time their pickup vehicle came by and I had heard that also the guide of the group of aliens would flash, give a signal with a flashlight to the driver, and they so worked their being picked up.

Q Was anyting found on Mr. Hernandez-Loera when he was arrested?

A Yes, sir, he had a flashlight and also spare batteries.

Q Now, the next time you found—well, when was the next time you saw this track again?

A It would be on the 16th of January of this year.

Q 1977?

A Yes, sir.

Q And where was that?

A On this date I started close to the Alvarez Mountains on the Topawa Itak road. I went in. I would also be west of Topawa on the Topawa Itak Road and that point is where I first observed this sign along with another [64] group of aliens.

Q Who were you working with?

A That day I—there was several agents out there but mostly with Officer Rayburn.

Q How did you and he work together?

A He worked north of me trying to cut the sign further north of me, while I started on the sign at this Topawa-Itak Road.

Q Well, what were you using for locomotion?

A Motorcycles.

Q All right. Go ahead and tell us what you did and what you saw.

A On starting tracks on the Topawa-Itak Road, immediately at the point of where I took off on the tracks they went through a wash that was real rugged, real brushy, where the road itself, had they walked 30 feet to the west they could have by-passed this real rugged, real brushy wash, which indicated to me at that time that at that point they were walking in the dark. I followed the sign on north. At one point I came upon a fence, an old fence that in places it was standing, in places it was completely torn down, and in other places the wire was gone. At one point all of the aliens passed through a fence that, had they stepped approximately ten foot to either side of it, they could have walked around the fence [65] where it was down, which also indicated at this point they were still walking in the dark.

I continued on the tracks. I don't know for sure because the speedometer on my bike didn't work, but approxi-

mately two or three miles, at which point I met up with Officer Rayburn and we continued on the tracks together.

Q Was there any indication from what you observed that any stops were made by this group?

A No, sir, none at all. At no point could we find where they stopped for a rest.

Q Did you make any determination as to the approximate size of this group?

A Yes, sir. I believe this group was fifteen. Fifteen or sixteen.

Q Did you make any estimate as to how far this group may have travelled?

A Yes, sir, we estimated approximately 24 to 27 miles. Part of it being that on Officer Rayburn's bike I believe he said he had 21 miles at the point where he and I started together to Milepost 122, or to Milepost, yes, I believe it was 122, to where he had the 21 miles.

Q Okay, did you make any estimates as to how long it would have taken this group to travel that distance?

A Yes, sir, we assumed, due to their straight line [66] marching type thing, which varies from the normal transcient alien that's not going to be smuggled, whereas a smuggled alien, they walk in direct lines or seen to walk in hard straight lines—

Q What does that mean to you if they do that?

A If they walk in hard straight lines—

Q What do you mean by a hard straight line, first of all?

A They, they seem to be guiding or noticing exactly where they're going or guiding on one particular point and heading straight for it, whereas we found in the average transcient alien—

Q What do you mean by a transcient alien?

A The aliens that we—that just cross the border and plan on walking until they find work. We find that these people will wander at times, they don't have any particular

point that they're heading on, and there paths will seem, will tend to vary back and forth. Whereas this group was more in a direct line walking like they were intending to hit a certain point. Which point I don't know what they were guiding on.

Q Did you notice any other tracks or trails while you were trailing this set of tracks?

A Yes, sir, we did. Different points, I don't recall how many times, but while on this set of tracks, [67] at one point I made a definite point to go over and take a look at them, which at this time the two groups were separated by approximately a hundred and fifty feet, at this point, I went over to look at them and it was a group of 13, and it also had the chevron print in the group, but it was older type sign.

Q Did you make any estimate as to the age of the track?

A I estimated five, five days to a week old.

Q Does the chart in front of you have any representation on it where it shows where you tracked these tracks on the 16th of January?

A Where I started, sir?

Q Well, does it show the trail that you followed?

A Yes, sir, roughly it does, yes, sir.

Q Would you describe for the Court how that's represented on the chart?

A Yes, sir, I made a dot type marking here.

Q What color is it?

A I did it in pencil, sir.

Q So it's a black dotted line?

A Yes, sir, gray, gray-black.

Q Gray dotted line?

A Yes, sir.

Q It starts out where?

[68] A It starts at the Mexico-United States border south of Itak.

Q And where does it go to?

A It goes to Milepost 122, Highway 86.

Q Parallels the highway between what mileposts?

A 119, roughly 119 and 122.

Q Did you track the tracks—you say you tracked the tracks up to the highway, is that correct?

A Yes, sir, we did.

Q Did you track to determine if they ever got off the highway?

A Yes, sir. We, Officer Rayburn and myself, on the 16th, worked together and we ran the highway approximately, the best I recall, nearly a mile or about a mile, and couldn't find any sign of their signs leaving the highway.

Q On both sides of the highway?

A Yes, sir.

Q Did you make any inferences from that?

A Yes, sir, that they were being picked up on the highway.

Q And did you make any inferences from their direction of travel of the foot traffic to the east with regard to what direction the vehicle may have taken?

A Yes, sir. We assumed that because the aliens [69] were walking in an eastward direction after hitting the highway that apparently the vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction.

Q Okay. Were you on duty on Sunday, January 30th?

A Yes, sir, I was.

Q About what time of day did you go on?

A I believe it was started at midnight between the 30th and 31st. I beg your pardon. I also worked the 30th, I also worked the 30th starting at Midnight of the 30th.

Q But you went on duty about Midnight between the day of the 30th and the 31st, is that correct?

A Yes, sir, I did.

Q And you were on duty during the early hours of the 31st of January, 1977?

A Yes, sir, I was.

Q Who did you go on duty with?

A Officer Ron Evans.

Q Ron Evans?

A Yes, sir.

Q And what were you going to do that morning?

A That morning, due to the fact that it was—the rains had cleared, we discussed it and decided that [70] we would set up in a position to observe tracks in an eastwest direction on Highway 86 to observe vehicles, because we both felt, and in our own minds we were sure that this was the night that this chevron print would bring his load through, this particular night.

Q Well, why did you believe that this was the night?

A The two prior times that I had had personally tracked was near the weekend, being on Sunday and one on a Monday. Also Friday, Saturday and Sunday previous to the 31st was rainy and inclement weather, which also in past experience we have not known smuggled aliens to be brought up in where they have to walk long distances in the inclement weather, therefore this 31st being clear with a good moonlight we set up in a position where we would watch traffic on Highway 86 in hopes of catching the vehicle transporting these subjects.

Q Where did you set up?

A Milepost 114, approximately, to Highway 86, just west of Three Points.

THE COURT: Just west of what?

THE WITNESS: Three Points.

THE COURT: Thank you.

Q (By Mr. Mueller) That would be to the east of Milepost 122?

[71] A Yes, sir, it would.

Q Is the point where you set up shown on the chart, Government's Exhibit 27

A No, sir, it's not. I could put an approximate point in there if you'd like.

Q Would you do that for me?

A Yes, sir.

Q How have you shown that on the chart?

A I've marked—I drew a circle with an X in the center with an arrow pointing to it, which above the arrow states "Milepost 114".

Q And that's where you and Agent Evans parked your vehicle?

A That is correct.

Q Why did you both stay at that area?

A Our first committment was to the Altar Valley, which would be the Sasabe area. That is where we were assigned and that was our first committment. We had to cover that area.

Q Where is that located in relation to the area on this chart?

A It would be straight south of Three Points, which all of this area from the highway down to Sasabe—

Q Is Three Points shown on that chart?

A Yes, sir, it is.

[72] Q What is Three Points?

A It's just a Y in the road.

Q Intersection?

A Highway 86 and 286.

Q And which road leads to the Altar Valley?

A Highway 286.

Q Is that to the east of the Babequivari Mountains?

A Yes, sir, it is.

Q Okay. So, you had a primary responsibility to cover what out of that area?

A All of the Altar Valley was our primary responsibility where we were assigned.

Q Any other reasons why you set up at that point, at Milepost 114?

A You mean other than to cover Altar Valley?

Q Why did you both stay there at that point?

A Regulation requires that both officers be together at all times, especially working at night, both officers have to be together, especially in making a stop or anything like this.

Q Is there anybody else on duty who you were working with?

A There was a man working in town. I don't remember if there's one or two.

Q In which town are you talking about?

[73] A In Tucson.

Q Was there anyone else out on the highway at that point?

A No, sir, there was not.

Q Why not?

A Lack of manpower. We're fairly short of manpower. Therefore, usually only two men are assigned to the Altar Valley.

Q You said you felt this was the night the chevron track would come through again. Did you anticipate any particular time for this happening?

A Yes, sir, we did. We knew it would, or according to what we observed in tracking, we knew that they were getting onto the highway or being picked up in the dark hours. On the 4th when I was down there, and also on the 16th when we tracked them, we observed all of their walking was done in the dark hours, or from the point at which we started on them which was just a short ways from the border. Walking time itself we figured about approximately two and a half to three miles an hour, which mandated that it would be at least eight to twelve hours walking time, therefore if indeed they crossed at dark ap-

proximately six or so, then it would be approximately two to six in the morning when they would be picked up.

Q Did you expect to find them travelling in any [74] particular type of vehicle?

A Well, sir, it was our feeling, we were sure we were dealing with a professional—

Q Why was that?

A Due to the repeated trips and the large groups being brought up. Therefore, we were looking for a vehicle that could easily hide, we figured, eight to twenty aliens. A vehicle that, with this many people in it, wouldn't draw attention from any law enforcement.

Q What do you mean "wouldn't draw any attention"?

A Which wouldn't make law enforcement agents suspicious seeing large numbers of people in that given vehicle, therefore we were looking for a van or pickup, camper shell or U-Haul track, something of this nature.

Q Did you believe you would see the people in the vehicle?

A No, sir, we didn't.

Q What did you—well, what other kinds of vehicles? Any motor home, would that have been—

A Yes, sir, we had information that motor homes in the past, trailers. I'm sure there's others. I can't think of them right offhand.

Q What kind of vehicles did you actually see?

THE COURT: When?

Q After you went on duty. What time did you get [75] at milepost 114?

A Approximately 1:00 a.m.

Q 1:00 a.m.?

A Yes, sir.

Q What kinds of vehicles did you actually see on that day?

A We saw—

Q January 31.

A —cars, pickups with no camper shells. We saw, if I remember correctly, a couple of linen trucks and semi-tanker trucks.

THE COURT: A couple what kind of trucks, linen?

THE WITNESS: Yes, sir.

THE COURT: l-i-n-e-n?

THE WITNESS: Yes, sir.

Q (By Mr. Mueller) Will you explain that to us?

A Like in fact I believe it was in fact Haskell Linen trucks, the laundry trucks.

THE COURT: And you mentioned some other kinds.

THE WITNESS: Yes, sir, we saw some—the semi-trucks, the tanker type trucks.

THE COURT: Tanker, you mean carrying milk or oil?

THE WITNESS: That type of truck, sir. We didn't pay any attention what its cargo would be.

[76] THE COURT: Were you looking at trucks only going in one direction?

A No, sir, we were observing traffic in both directions. The reason we were watching for the traffic in a westbound direction was for—to get possibly an idea of the vehicle and the time it took to see if it did come back by our location.

Q What do you mean by timing it?

A At this time—well, we were set up at Milepost 149, and we knew we were 20, 25 miles roughly away from what I had known as the pickup area before, therefore we figured a good hour and a half or so from, if a vehicle did pass our location, to where it could get down in this area, make the pickup, then come back by our location.

Q Did you see any vehicle—well, how many vehicles did you see going from east to the west during the time you were parked?

A I didn't count them, but I guess 15 to 20 vehicles.

Q And did you see any vehicles at all which fit what you considered to be the proper type of vehicle for this operation?

A Yes, sir, we did, at approximately 4:30 we saw a pickup and camper shell.

Q Is that the only one you saw?

A No, sir, we saw one other with a pickup and [77] camper shell. During this period of time that was the only two vehicles that we considered likely for a pickup.

THE COURT: In other words, you're saying you saw two pickup with camper shells between the hours of 1:00 and what?

THE WITNESS: Well, from the time we made the stop, Your Honor, which would be about 6:12 I believe was the time we made the stop.

THE COURT: From 1:00 to 6:00?

THE WITNESS: Yes, sir.

Q (By Mr. Mueller) When did you see the first pickup truck with a camper?

A Approximately 4:30.

Q And did you notice anything about it when you first saw it?

A Yes, sir, Officer Evans and myself had worked it out where if we would, were going to ID a vehicle I would move closer to the highway, as close as I could get without being seen, and I would try to get the license number and he would try to get the general description of the vehicle itself. On this particular one at 4:30, I could get the partial of the license plate, which would be GN88, that's all I could get.

Q Was that an Arizona plate?

A Yes, sir, it was.

[78] Q Do you recall what the vehicle looked like?

A I couldn't give a good description of the vehicle itself because I was concentrating mostly on the license plate,

although Officer Evans tried to get the best description he could as far as pickup and camper shell and what have you.

Q And what, you don't remember what color it was?

A No, sir. In the darkness hours you could only tell if it was a lighter shade or a darker shade.

Q There were no headlights on the vehicle that you saw? No headlights of another car?

A No, sir, it came by itself.

Q And then when did you see this second pickup with a camper?

A Approximately 15 to 20 minutes later. It was about ten til five that morning.

Q Okay, did you make any calculations as to when you might expect one of these back if it did what you thought it would do?

A Yes, sir, we did. Like I said before, approximately, we figured, an hour and a half or in that vicinity.

THE COURT: I'm sorry to interrupt. That's two pickups with campers on, they were travelling in which direction?

THE WITNESS: In a westbound direction, sir.

[79] THE COURT: Both were going west?

THE WITNESS: Yes, sir.

THE COURT: Thank you. I interrupted you when you were going through some calculations.

THE WITNESS: Like I said, we calculated approximately an hour and a half from our position at a normal rate highway speed to this area, to load the aliens and then to come back by our position.

Q And what speed were these two pickups with campers travelling?

MR. RINALDI: Could we have some foundation for that, your Honor?

THE COURT: Foundation? You mean that he is a scientist of some kind?

MR. RINALDI: Well, that he is able to determine one way or another, has any experience in that regard.

Q (By Mr. Mueller) Have you based on your experience—

THE COURT: You don't have to do this. My Lord. How fast did you say they were each going, if they were going the same, first one was going how fast, in your opinion?

THE WITNESS: We just guessed, your Honor, an average highway speed of approximately 50, 50 miles per hour.

[80] THE COURT: Each were going 50, 55?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (By Mr. Mueller) After you saw this last vehicle at about 4:45, ten minutes to five, did you see any other vehicles?

THE COURT: Going west?

Q (By Mr. Mueller) Going west or east?

A I'm sure there was some other westbound vehicles, like I said there were none that fit our description, or descriptions we were looking for.

Q During the time you were at this place on this period of surveillance, how many cars came from the west and went to the east?

A There again we didn't keep count. I could only guess approximately six, eight or ten, something like that.

Q Did you see either of these two vehicles again?

A Yes, sir, we did. The first vehicle that passed our position at approximately twelve after six again passed our position in an eastbound direction.

Q In the opposite direction you first saw it?

A That's correct.

Q And this was approximately an hour and a half after you had seen it going to the west?

A Just a little over an hour and a half, yes, sir.

[81] Q And what did you do then?

A We fell in behind the vehicle.

Q Did you check the license number?

A That is correct.

Q What did you determine from looking at it?

A We determined that it was—we were sure it was the same vehicle because of the GN88.

Q What was the actual number, do you recall?

A GN8804, I believe, was the full license plate number.

Q N for Nora?

A Yes, sir, Gulf Nora 8804.

Q What happened then after you verified the license number.

A Then we turned on our emergency lights and stopped the vehicle.

Q Did you have any belief at that time as to what was in that vehicle, as to who was in it?

A Yes, sir, in our own minds we knew it was the right vehicle.

Q Know what?

A There was no doubt in our minds this was a smuggling load.

Q Any particular one?

A Yes, sir, We—there again in our own minds we [82] knew that Chevron would be in this group.

Q All right. You turned on the lights and then what happened?

A The vehicle pulled over and before we could get completely stopped and clear the vehicle, the driver got out and hurriedly approached towards us. At this same time the curtain on the rear window of the camper shell was pulled back just a little bit like someone was looking out.

Q Could you demonstrate for the Court what you mean by that? What did you see occur?

A The corner looking at it from the rear, it would be the left corner of the curtain was picked up and pulled back to the right, and then it was quickly released.

Q Did that—did you draw any inferences from that?

A Yes, sir, a couple. For one thing, we knew that somebody was in the back, and apparently by it being released quickly they didn't want us to see them for some reason or other.

Q And did you get out of the vehicle, your vehicle?

A Yes, sir, I did, and approached the driver.

Q And what did Agent Evans do?

A He stood by the patrol car, as it's policy more or less that we have a man stay back as a safety precaution.

Q Was this a marked vehicle you were driving?

[83] A Yes, sir.

Q What kind of a vehicle was it?

A The make, sir?

A No, well, was it a sedan?

A Yes, sir, it was, with a full red lights and siren.

Q Wasn't a four-wheel drive?

A No, sir.

Q And had the Border Patrol colors and insignia on it?

A Yes, sir, it did.

Q Were you and Agent Evans in your uniform?

A Yes, sir, we were.

Q Were you carrying your pistols, revolvers?

A Did we have them with us?

Q Did you have them on your person in the holster?

A Yes, sir.

Q When you got out of your vehicle did you draw your revolver?

A No, sir, I did not.

Q Did Agent Evans have any weapons drawn of any kind? To your knowledge?

A To my knowledge, no.

Q Did you see him pointing a weapon at anyone?

A No, sir, he did not.

[84] Q Where he was standing at the car?

A No, sir.

Q Did you have the lights of your vehicle turned on after you stopped this truck?

A Yes, sir, we did.

Q And you approached the truck, what happened then?

A Well, as I stated previously, the driver approached us rather hurriedly and I met him at the back of the pickup, or in the vicinity near the rear of the pickup, and I identified ourselves as immigration officers, Border Patrol, and told him it was an immigration check and asked him if he was an American citizen. He stated that he was. His manner of speech was rather shakey. Also it was, well, at this point I asked him if anybody was in the back of the pickup, and he hesitated momentarily and stated yes, he said I, not quoting him, but he stated something to the effect that he had picked up some hitch-hikers and at this time he opened up the back of the camper shell.

Q Did you ask him to do that?

A No, sir, I didn't.

Q He did it without any question?

A Yes, sir, he did.

Q Did you have a gun drawn, pointed at him at that time?

[85] A No, sir, I didn't.

Q Had you made any body search of him at that time or shortly prior to that?

A No, sir, I hadn't.

Q What happened after he opened the back of the camper?

A I observed the bodies, some bodies laying in the back of the pickup, and I determined alienage, illegal alienage.

Q How many were there?

A Six. And therefore at this point I placed the driver under arrest.

Q And was anyone else found in the vehicle?

A Yes, sir. After I had handcuffed the driver, then Officer Evans walked up to the passenger side of the truck and observed another subject sitting on the passenger side. He opened the door, he established illegal alienage on him, and at this time he looked at the footprint, or at the shoes, and it was the chevron print that we were looking for.

Q Same as in the photograph in Exhibit 1?

A Yes, sir, that is correct.

Q And there was a subsequent search of the person who was a passenger in the passenger compartment?

A Yes, sir, there was.

[86] Q Is that when the flashlight and batteries were found?

A No, the flashlight and batteries were found at the office. He had a backpack, a green-colored backpack. We were concerned with the safety, being out on the highway at this hour of the morning and didn't want to conduct a full search at this point. We just secured the driver and the rider with handcuffs, transported them to the office, and then at the office we searched the backpack and found the flashlight.

Q Where did you first see the backpack?

MR. VELASCO: Objection, your Honor, it's not relevant to the stop.

THE COURT: I can't tell.

THE WITNESS: The backpack was up front in the front part of the pickup.

Q (By Mr. Mueller) Did you identify if any of the people who were in the truck were in the courtroom today? Did you identify anybody who might have been in that truck?

A Yes, sir, I recognize Mr. Loera, Mr. Hernandez. The other man I'm sure is him without the beard.

THE COURT: I'm sorry, you identified Mr. Loera?

THE WITNESS: Mr. Hernandez-Loera.

THE COURT: What does he look like?

[87] A He's the man in the green shirt with the mustache.

THE COURT: Then you said somebody else.

THE WITNESS: Mr. Cortez.

THE COURT: You said something about a beard.

THE WITNESS: Yes, sir, I don't recall the beard.

THE COURT: But is your recollection that Mr. Cortez is in the courtroom?

THE WITNESS: Yes, sir.

THE COURT: With a beard?

THE WITNESS: Yes, sir.

THE COURT: Anything else you can tell me about him?

THE WITNESS: He has a pink, light pink, to me, jacket on.

THE COURT: And who was he, the driver or the passenger?

THE WITNESS: He would be the driver, sir, Mr. Hernandez would be the passenger.

THE COURT: Thank you.

MR. MUELLER: That's all I have, your Honor.

THE COURT: Shall we have a short recess now?

MR. VELASCO: Yes.

(A short recess was taken.)

[88] **CROSS EXAMINATION**

BY MR. VELASCO:

Q Officer Gray, you indicated that on January 4th you saw a footprint resembling the chevron print at the Little Tucson Cattle Gate. Was that correct? Am I correct in as-

suming you also tracked that chevron from the cattle gate to the Little Tucson?

A No, sir, to Milepost 122.

Q Okay. And you never—that chevron then did not go south from the cattle gate into Little Tucson?

A No, sir.

Q You said that the aliens, whether they were people that were travelling from south to north, in your backtracking you saw them going up a wash that was pretty hard to negotiate?

THE COURT: Excuse me, are we talking about the night of the 16th?

MR. VELASCO: The 16th, yes.

THE COURT: Yes.

Q (By Mr. Velasco) On the night of the 16th you said you saw some tracks going north on a wash that was very hard to negotiate, is that correct? Sir, you stated backtracking. Why do any backtracking? Did you track forward?

A Yes, sir.

Q In your tracking forward, if there was a wash, [89] it was very hard to negotiate, where if they had moved a few yards over to the right or left they could have used a road, is that correct?

A If they had moved to the left.

Q They would have a more easy time of travel, is that correct?

A Yes, sir, much easier.

Q Now, would this—is this a well-travelled road?

THE COURT: Which is the well-travelled?

Q (By Mr. Velasco) Is the road or path you said they could have followed?

A I don't know how well-travelled it is, sir. It's easily identifiable.

Q Let me ask you this. Can you see a vehicle, if you're on that road, can you see a vehicle—

MR. MUELLER: I object to the characterization of a road.

Q (By Mr. Velasco) Is it a road?

A Yes, it's a road.

Q And vehicles can travel on that road?

A Yes, sir, they can. In some places it appears a four-wheel drive would be better.

Q A person on the road, would they be able to see a vehicle before the vehicle saw them, or the people in the [90] vehicle would see them?

A On this particular road?

Q Yes.

A Yes, sir, I believe they could.

Q Given this information, would you say that the persons using the wash would not be acquainted with the area?

A No, sir.

Q Are you saying, sir—

MR. MUELLER: Your Honor, I object to interrupting the answer, sir.

THE COURT: Have you finished?

THE WITNESS: Yes, sir, I guess.

Q (By Mr. Velasco) You're saying then a person familiar with the area would not travel along the road, but would rather go into the rough brush and beat their way north?

A You're talking about this road in daylight hours would easily have been seen. Nighttime hours it would not have been seen, beg pardon.

Q Would a person familiar with the area be able to find that road?

A It's an east-west road.

Q Doesn't go north-south at all?

A I guess at points it might angle northeast or [91] northwest or something, but it's not a north-south road.

Q So you're saying then that really then the only way to go north is up that wash?

A It makes an angle type, yes, through the wash.

Q So the road is of no use then to a person going north?

A No, sir, that particular road, no vehicle, no.

THE COURT: Excuse me, for a vehicle you mean?

THE WITNESS: For a vehicle, no, sir.

THE COURT: No, I don't know whether Counsel was talking about a vehicle, you're saying it would be of no use for a vehicle.

THE WITNESS: Not for north-south vehicle direction, no, sir.

THE COURT: Is that what you're talking about?

MR. VELASCO: I'm asking if it would be any use for a person travelling north and south, would that be used?

THE WITNESS: It's an east-west.

Q (By Mr. Velasco) So when you said they could have used the road they really couldn't have?

A Through this particular wash, yes, they could have.

Q All right. We'll let it go at that. You indicate there's two kinds of aliens. Those that are going on a shall we say a forced march from Point A to [92] Point B and you characterize those people as people that walk in a determined manner in a determined direction.

A Yes, sir.

Q Then you said there were other kinds of people who just sort of wander on their way north, is that correct?

A Yes, sir, I did.

Q So are you saying then that, and I seem to get the idea that you said that people who are going as a group being guided by someone would not take the roads; in other words, they would avoid the roads, is that correct?

A Yes, sir, they would avoid the road, and you—

Q And they would go in a very straight direction, or would seem to have some definition?

A Which was walking straight, sir, I also had previous testimony they would go around, in daylight hours, people go around hard obstacles.

Q I'm not arguing with the particular movement of obstacles, I'm talking about their heading.

A Yes, sir.

Q People that are being guided you say travel with a definite line you can predict where they're going, is that correct?

A Yes, sir.

Q And you seem to say that the people that are just out there on their own will wander a little bit more.

[93] A Yes, sir, that is correct.

Q Are you saying then that the people that just wander by themselves don't know how to navigate on land?

A No, sir, we're saying that the people not familiar with the particular area, the indecisiveness of where they're going exactly will have a tendency to wander to some degree.

Q Are you saying then that in this area there are no market noticeable trails?

A No, sir, there's not definite trails in this particular area.

Q Okay. Now, isn't it—am I correct that when you followed this track, all these tracks on whatever days you were out there, did you do it on a motorcycle at all times?

A Yes, sir, there was—

Q And isn't it true when you're travelling on a motorcycle you're going at a fairly rapid pace compared to a person that would be walking on the trails, isn't that correct?

A Compared to a person walking, yes. At times, but also at times I move the motorcycle very slowly, depending on how easy it is to find the tracks.

Q And you're saying that in the 27 miles that these people walked or however many miles these people [94] walked, they never stopped?

A That is correct.

Q Just one straight forced march?

A That is correct.

Q And you say that without any reservation although you didn't walk the course yourself?

A At this point we followed, I would very—at no point from the time we started 'til Milepost 122 could we find a point where they stopped for a rest.

Q And this is from your observation on the cycle?

A That is correct, sir.

Q Am I correct also in assuming—and this is on the 31st, the day the vehicle was stopped—you didn't stop or didn't wait for the second vehicle to come by or see if it would come by, did you?

A No, sir, we did not, there was a 15 to 20 minute separation between the two vehicles.

Q So it was your intention, was it not, to stop this vehicle, the first vehicle that came back, and search it, is that correct?

A Yes, sir.

Q And then if that vehicle contained nothing it, you would stop Number Two vehicle if it came by, isn't that correct?

A Given this particular time period, yes, sir.

[95] Q So it was your intention then to stop every vehicle that went west and returned east—

THE COURT: He didn't say anything, about every vehicle, Counsel.

Q (By Mr. Velasco) Well, let me rephrase the question. It was your intention to stop what you earlier described as suspicious vehicles that would head west and then return east, is that correct?

A Capable of hauling the aliens, the number of aliens we had pre-determined, yes, sir.

Q So that was your plan, is that correct?

A Our plan was to, yes, to stop the vehicles in this given period of time because we had no prior information as to the type of vehicle.

Q So if you would have seen at that time, during that time frame, your time frame of between 2:00 and 6:00 o'clock, if you had seen a van, a truck, a truck with a camper shell and a motor home, a trailer, all these vehicles, go west and return east, you would have searched every single one of them?

THE COURT: Within the time frame, Counsel.

MR. VELASCO: Within the time frame.

THE COURT: You didn't add that.

MR. VELASCO: That's what I meant to say.

MR. MUELLER: I object to the speculative nature [96] of it, anyway.

THE COURT: I'll allow it in. Would you agree or not?

THE WITNESS: Sir, that, you're saying had we observed it going west and then back east?

Q (By Mr. Velasco) Yes.

A In this time period?

Q Yes.

A Yes, sir.

Q You would have searched every single vehicle that did that, right?

A Had they been capable of hauling this amount of aliens well hidden, you bet.

Q With respect to the unsuspicious vehicle that—you determined there was a profile, did you not?

A To what sir, in the vehicle?

Q For the vehicles that you would stop.

A Yes, sir.

Q And your profile was based in part upon the number of people you calculated were walking on this route, isn't that correct?

A In what respect, sir?

THE COURT: He says the profile of the car that you had in mind had a relationship to the number of people that you determined had previously used and made these [97] marches?

THE WITNESS: Yes, sir, that is correct, and to the number of aliens, we figured eight to 20.

Q (By Mr. Velasco) In other words, you figured there would be eight to twenty aliens coming through that route at one time?

A This is what we had observed in the past. We hadn't observed any less than eight, no more than twenty.

Q Let me ask you this, sir. In your experience as a Border Patrol agent, are you familiar with the technique where aliens are sometimes in a sedan, placed in the trunk of the vehicle and also in the vehicle itself?

MR. MUELLER: I would object, your Honor, it's irrelevant in this case because based on his prior—

THE COURT: I think it's outside the scope of what we're talking about, sometimes they come across singularly and not in automobiles at all, I guess. Whether they were in automobiles, the top of the engine or in trunks seems to me, Mr. Valesco, doesn't quite fit into the profile he's talking about.

MR. VELASCO: Yes, your Honor, the point is that I am trying to show—

THE COURT: Be my guest, ask him.

Q (By Mr. Velasco) Have you heard of it?

A Yes, sir, I've even heard of them on bicycles.

[98] Q The point is then you could put eight people in a sedan?

A With some difficulty, but there again you're drawing suspicion to some degree.

Q It has been done?

A It has been done.

Q But you determined not to stop that type vehicle?

A Yes, sir, we did.

Q Am I correct, also, in assuming that no one was stationed to the west of Sells?

A That is correct, sir.

Q No Border Patrol agent was stationed to the west of the pickup point?

THE COURT: Is this for the purpose of some plan of your own, or with regard to the time frame or what? I have a suspicion it relates to whether you're going to put on testimony or not. Anyway, I'm just suspicious, you may ask, go ahead, nobody else objected. Do you have anybody at Sells looking?

THE WITNESS: No, sir, we were the only two agents looking.

Q (By Mr. Velasco) From Three Points to Sells, what's the distance?

A Sells is approximately, sir, I think Milepost 113, and Three Points is approximately 150, somewhere [99] along in that area.

Q 150?

A Yes, sir.

Q And the distance is?

A Between 35 and 37 miles, something like this.

Q A vehicle then could travel from Three Points to Sells and back to Three Points within the hour and a half you allotted yourself?

MR. MUELLER: Your Honor, it could be faster than that.

THE COURT: Yes, he could do it, I suppose somebody could run it even.

MR. MUELLER: I object to the form of the question.

THE COURT: Well, I'll allow it, Counsel, because when defendants want to do something the rule is they should be allowed. That's the Ninth Circuit Rule.

All right, Mr. Velasco.

THE WITNESS: Yes, sir, it's possible the vehicle could do that.

Q (By Mr. Velasco) And in your calculation, sir, you had estimated an hour and a half, and the first vehicle you stopped in fact had come through an hour and forty minutes later, had it not?

A That would be correct, sir, in that.

[100] It didn't come in within the time frame you expected it, did it?

A Yes, sir, because we were looking for about an hour and a half.

Q Would you have stopped the vehicle if it would have come by two hours after you first observe it?

MR. MUELLEN: I object on the grounds of speculation.

THE COURT: Speculation, Counsel, yes.

Q (By Mr. Valasco) When you stopped the vehicle and you told the driver this was an immigration check—

THE COURT: The vehicle had come out—the driver had come out and came toward him when he asked him?

MR. VELASCO: Yes, your Honor.

THE COURT: I thought you said that the driver was in the car.

MR. VELASCO: No.

Q When you had this discussion with the driver and you told him it was an immigration check, did you mean by that that you wanted to check his documents?

A I had to establish alienage of him until such—

Q You were stopping the vehicle, were you not, to search it?

A To establish alienage of the occupants, visible occupants.

[101] Q Of the visible occupants?

A Yes, sir, that is correct.

Q Prior to stopping the vehicle did you see any occupants?

A No, sir, we didn't. And upon the stop is when we saw the curtain move.

Q You didn't know who was in the vehicle at all?

A No, sir, we didn't.

Q So you didn't know, you didn't have any reason, when you saw the vehicle go by, to suspect that the driver was an American citizen, Canadian citizen, Mexican citizen, Mexican-American?

A No, sir, we couldn't tell due to the darkness.

Q Could you describe the second vehicle that went by there, that you thought fit into your profile?

A I couldn't give you a real good description, no. I was looking mere for the license plate.

Q Do you recall that license plate?

A No, sir, the license plate number was out—or light, correction.

THE COURT: I'm sorry, the second vehicle license plate was out?

THE WITNESS: License plate light, your Honor.

THE COURT: Was out?

THE WITNESS: Yes, sir, it was not burning.

[102] Q (By Mr. Velasco) Which made it more difficult, would have made it impossible to determine if that was the same vehicle, would it not, in terms of registration?

A That is correct.

Q Was that suspicious to you?

A Yes, sir, it was.

Q You said that when a vehicle came by about and 42 minutes later you fell in behind the vehicle and you said you felt sure it was the same vehicle. Is that an accurate statement of your state of mind at the time?

A Yes, sir. I stated, if I remember correctly, in our own minds we knew it was the same vehicle.

THE COURT: You said he used a different phrase. Are you taking it from a report or from what you recall the man testifying to?

MR. VELASCO: From what I recall him testifying to.

THE COURT: All right, go ahead.

Q (By Mr. Velasco) So now you say—

THE COURT: Not now.

Q (By Mr. Velasco) At this time, at the present time, you felt it was the same vehicle?

A Yes.

Q You felt that way even though you didn't have a complete license plate number on the vehicle, isn't [103] is that correct?

THE COURT: That's where he said "felt" and not "sure".

Q (By Mr. Velasco) And similarly at this time you don't have an accurate description other than it was a pickup with a camper shell and it was light or dark in color, isn't that correct?

A That is correct. The height of the camper shell in relation to the cab of the pickup, and like I said, the two letters and two numbers of the license plate itself.

Q Do you have any idea how many vehicles might have those—

THE COURT: Those what?

THE WITNESS: Of what, sir?

Q (By Mr. Velasco) Those numbers, the numbers that you had in your knowledge, that you had available to you.

A The GN88?

Q Yes.

A No, sir, I don't have any idea at all.

THE COURT: Am I going to hear evidence as to how many Arizona issued with these?

MR. VELASCO: No, your Honor.

THE COURT: No.

[104] Q (By Mr. Velasco) With respect to the flashlight that you make reference to, did you state what the purpose of the flashlight was?

THE COURT: What the purpose of that flashlight was?

Q (By Mr. Velasco) Yes, if a flashlight was in this operation.

A No, sir, I did not state what this flashlight was for.

THE COURT: I don't think Counsel meant that, you didn't mean this one?

MR. VELASCO: I would rephrase the entire question.

THE COURT: Yes.

Q (By Mr. Velasco) When you watch, your line cutting and tracking of this trail, there was nothing there that indicated a flashlight was used, was there?

A No, sir, there wasn't.

Q And am I correct or would it be fair to say that the fact that a person walks west to east doesn't really indicate that the person desires to go east, does it?

THE COUNT: You mean at the moment he's walking or when he stopped or smokes?

Q (By Mr. Velasco) No, in the eventual direction, [105] if they travel at night?

A I don't suppose it would be conclusive they're going east, no.

Q So it would be possible, it would be fair to say, would it not, that a person walking west to east at night—

THE COURT: In the desert.

Q (By Mr. Velasco) In the desert on this highway or off the highway would be doing so he could keep an eye on a vehicle travelling east to west or look for a vehicle travelling east to west?

A No, sir, that doesn't make much sense to me. If they're going eventually going to go the opposite direction, why—

Q Let me ask you this. When you're walking west to east, you can see things coming east to west, can you not?

A That is correct.

Q But if you are walking east to west, to see things coming from that direction, travelling that same direction, you have to turn around, would you not?

A That is correct.

Q Officer, you predicated your belief that the vehicle would come by about 2:00 or 6:00 o'clock in the morning upon an estimate that the vehicle—or that the [106] aliens or any persons that would be picked up would start travelling around 6:00 o'clock, isn't that correct, 6:00 o'clock in the evening?

A This was about the time at this time that it was getting dark, approximately 6:00 o'clock.

Q Now, if the persons had started travelling 3:00 or 4:00 o'clock in the afternoon, isn't it possible then that the people could have been at the highway between 11:00 and 3:00 o'clock?

A Well, sir, it had been established—

Q Well, answer that question, would you please?

MR. MEULLER: I object, it's irrelevant.

THE COURT: Maybe Counsel is going to introduce evidence that some people left at 3:00 o'clock. I don't believe he is, but maybe he is, I'll allow it. As I said, under the rule, ask the question. If they left at 3:00 in the afternoon they would arrive—

Q (By Mr. Velasco) Wouldn't they arrive somewhere around 11:00, a little after Midnight?

A Yes, sir, it's possible with this—

Q And no one was on duty between 11:00 or 1:00 o'clock, were they? Near the Three Points area?

A No, sir.

Q You don't know what happened at that area, do you?

[107] A No, sir, I don't have any idea.

Q And to your knowledge there was no observation of this route on that date, was there?

A On this date?

Q Yes.

A No.

Q So it was merely a belief on your part that there might be some traffic concerning that.

THE COURT: Oh, he added other things to that, Counsel. He told us about the moon, told us it would be at night, had been raining lately, and a lot of things. I don't suppose they cross in the daytime, anyway, do they? Do aliens cross the border in the daytime in large quantities?

THE WITNESS: Yes, sir, the transcient aliens.

THE COURT: No, I mean groups of seven to twenty, fifteen. Have you had experience with that.

THE WITNESS: There has been experiences, yes, of other smuggling cases that have come in the daylight hours, but not to my knowledge in this area.

THE COURT: Thank you.

MR. VELASCO: I have no other questions.

[108] **CROSS EXAMINATION**

BY MR. RINALDI:

Q I know the Judge has been here awhile, but can you tell me what Sells is, just so the record reflects what kind of a community Sells is?

A It's an Indian village, small Indian village.

Q Would you agree with me that Sells is the largest single settlement on the Papago Reservation, Indian settlement?

A To my knowledge of the reservation. I'm not that familiar with all of the settlements there.

Q But it is—would you agree with me it's the center of their tribal government?

A There again, sir, I don't—I'm not involved with the Indians, so I don't know.

Q Do you know of any larger settlements on the Papago Reservation?

A No, sir, not to my knowledge.

Q If I follow this road out, the highway, I come to Ajo, is that correct?

THE COURT: Follow what road, Counsel?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) 86 going west.

A Yes, sir.

Q Is Ajo also in Pima County?

[109] A I don't know, sir, I haven't been over there.

Q Is there any other major arteries between Tucson and Ajo that you know of?

A No, sir. You mean another route?

Q That is correct.

A No, sir, I don't.

Q This is the main road between Ajo, Arizona, and Pima, Arizona—or Tucson, Arizona?

A Yes, sir, to my knowledge.

Q Likewise this is the main route between Sells and Tucson, Arizona?

A That is correct.

Q Now, you indicated that—well, were you observing traffic on the nights of the 28th, 29th or 30th of January?

THE COURT: On?

MR. RINALDI: The 28th, 29th or 30th of January.

THE COURT: Yes, observing traffic on I-10?

Q (By Mr. Rinaldi) No, no, observing traffic at the same spot you observed traffic there at Three Points on January the 31st.

A Sir, I've never before gone over there to set up to observe traffic on Highway 86 prior to this night.

Q Did you have occasion to outline or do any tracking in the area of the route followed by the chevron [110] truck on the days of January the 28th, 29th or 30th?

A No, sir. It was raining those day. Or inclimate weather.

Q You have no way of knowing then whether smugglers or the chevron-shoed individual came through the Papago Reservation along his normal route on any of those days, do you?

A Do I have knowledge of that?

Q Yes.

A No, sir, I don't.

Q And there's no way you could tell because you never went out there to observe, did you?

A There's prior experience knowing—

Q Well, answer my question, sir, I—

A No, sir, I have no knowledge whether he came up there those days.

Q Would you agree with me he could have come up through that area with a load of aliens any one of those days?

A It's possible, yes, sir.

Q Now, you indicate that you were checking the Altar Valley Road, is that Correct, and that was your primary source of concern on that evening?

THE COURT: Is there a road there? I thought it was a valley.

[111] Q (By Mr. Rinaldi) Well, the Altar Valley, I'm sorry, the road to Sasabe Junction, is that correct?

A The Altar Valley, that leads into the Altar Valley.

Q Perhaps you could draw us a picture of the Three Points area and show us where the Altar Valley is in relation to the position where you—

THE COURT: Why don't you draw it and ask him whether it's a fair representation.

THE WITNESS: It's on the map, sir.

THE COURT: He said it's on the map.

THE WITNESS: Three Points and here's the Baboquivari Mountains.

Q (By Mr. Rinaldi) Now, you indicate you were at Milepost 148, is that where you were?

A 149.

Q Fine, how far is 149 from the junction of Highway 286 with Highway 86?

A Approximately a mile, a little over a mile possibly.

Q So you were one mile to the west of Three Points, is that correct?

A That is correct, sir.

Q How were you able to observe the traffic coming up Highway 286 to Highway 86 if you were one mile to the [112] west of the junction?

A For one thing, sir, this sets up in a little higher elevation and you can easily see vehicles, especially in the last few miles, of this highway.

Q So when you say you can see them, you can see their headlights, can't you?

A For—yes, sir.

Q But you can't tell if they're trucks or they're cars, all you can do is tell there's a vehicle?

A Well, sir, without disclosing our classified information as to a sensor field, we can also know of vehicle movements in the Altar—in the southern part of the Altar Valley without being in the area itself.

Q Well, if a rancher, for example, say the King Ranch, you know where that is?

A Yes, sir.

Q If a rancher from the King Ranch, which I believe is just to the south of Highway 86 on 286, is it not?

A Yes.

Q If a rancher were to come up that road at night would you be able to tell whether he was driving a truck or whether he's driving a car or who he was or identify him in any way other than knew there was somebody on the road?

[113] A Of course not, sir.

Q Now, a linen truck went by you, is that correct?

A I think one or two or three of them, sir, I don't recall.

Q Do you know what time the linen trucks went by?

A No, sir, I don't have any idea.

Q Did you take their license numbers?

A No, sir, I didn't.

Q Would I be correct in assuming a linen truck is the type of truck that could carry between eight and 20 aliens without raising suspicion?

A It could, sir.

Q Were you in any way suspicious of the linen trucks?

A No, sir, not to that extent, no, sir.

Q Did you time the linen trucks?

A No, sir, we didn't.

Q Do you know if the linen trucks came back?

A I have no idea.

Q You don't know what time they went out and you don't know if they came back, but they could have been carrying aliens or they were capable of carrying aliens?

A Yes, sir, they could have.

Q Do you know—well now, you determined that on the 4th of January, someone had come up to Highway 86 [114] and had reached Highway 86 approximately Milepost 119, is that correct?

A That's where I started on them, yes, sir.

Q Then they proceeded to the east, to Milepost 122?

A That is correct.

Q And then they stopped at 122 and it appeared they were picked up there?

A They led straight out onto the highway.

Q Is there anything at Milepost 122, a place to wait, you know, maybe a depression in the ground someplace where people, if they're illegals, can sort of squat down and not be seen from the road?

A Yes, sir, there's a culvert right there.

Q Fine. Now, on the 16th, where did you determine that the aliens were ultimately picked up?

A Apparently on the highway, sir.

Q Okay, at what point in the highway?

A They entered the highway just west of the culvert that goes underneath the highway.

A At Milepost 122, is that correct?

A That's correct.

A Would you assume from that fact that the aliens were going to Milepost 122 as a reconnoitering point or a rendeavous point?

[115] A The two previous times, yes, sir.

Q So you experience suggested to you that they went to Milepost 122 and hid in the culvert—

A (Witness shakes head.)

Q You're shaking your head.

A No, sir, I don't agree with that. I stated before that the aliens entered onto the highway west of the culvert. Not going down into the culvert, and—

Q But you would—okay, you would agree with me that on the previous occasions when you had observed these people or observed traces of these individuals, that on the two previous occasions they apparently rendezvoused with a truck or a vehicle of some nature at Milepost 122.

A Two times. But the one time that I tracked them, which would be on the 4th, I saw the older group with this same type marking, which I didn't have up around Milepost 122, so somewhere between 119 and 122. I didn't—

Q All right. Those tracks were old tracks, though, you indicated.

A They were older type tracks.

Q And I believe you indicated there was rain during that period of time?

A No, sir, I didn't indicate during that period of time, no, not around the 4th. I don't recall.

[116] Q On the first set of old trucks, do you know in fact where they ultimately went up to the highway? Could you tell?

A Which set of tracks, sir?

Q The older tracks that you saw on January the 4th.

A No, sir. Like I said, I didn't follow them. I just observed them from time to time but didn't see them at 122.

Q So that to your personal knowledge you saw the trucks on three occasions. Once you saw a fresh set on January the 4th. On January 4th you saw also an old set, you again saw them January 16th.

A Plus an older group on the 16th.

Q But the two fresher sets, the ones you actually were tracking, both of them led you to Milepost 122 and at that point you lost the tracks and concluded they met a truck or vehicle on the highway, is that correct?

A That is correct.

Q Could you tell which direction the vehicle was heading when it picked them up?

A No, sir. I can't track that well on pavement, sir.

Q All right. Fine. And the vehicle could well have gone on the Casa Grande, could it not, through Sells?

[117] A Yes, sir, I suppose it could have.

Q Appeared the vehicle could have came from Casa Grande, picked the individuals up and returned through Sells, couldn't they?

A Yes, sir, I suppose it could have.

Q And you had no definite information which would have told you that the vehicle which was going to pick up any aliens would have had to have come from Tucson?

A No, sir, I didn't.

Q Now, when you sat out there on the evening of the 31st, you said you did not observe the westbound traffic, or pay much attention to the westbound traffic—I mean eastbound traffic, is that correct?

THE COURT: Let's start again.

Q (By Mr. Rinaldi) All right. I'll backtrack so I don't confuse everybody.

When you went out there January the 31st, were you keeping track of cars coming from the west which had not originally passed you going east? I mean.

THE COURT: Counsel, may I suggest that we take a recess and then maybe at 1:00 o'clock you'll have the question pretty clear in your mind.

MR. RINALDI: I'll write it out in longhand, your Honor.

THE COURT: Thank you, 1:00 o'clock, gentlemen.

[118] (A recess was taken.)

THE COURT: All right, Mr. Rinaldi, please.

Q (By Mr. Rinaldi) Officer, you indicated that you were at Milepost 149 on the evening—or the morning of January the 31, 1977, observing traffic. And you further indicated that the suspected pickup point for the aliens was Milepost 122, is that correct?

A In that area, sir, I didn't specify 122.

Q Well, then would you agree with me that we are talking about a distance of approximately 27 miles away?

A Approximately, yes, sir.

Q And a round trip distance of approximately 54 miles?

A Again approximately, yes, sir.

Q And you had indicated that when you saw the two trucks pass in the morning on January the 31st, 1977, that is the truck which was supposedly driven by Mr. Cortez and the truck which followed that—

THE COURT: What do you mean "supposedly driven by"? The man testified who the people were in the car. Is that what you mean?

MR. RINALDI: Well, supposedly because I don't believe the officer knew at the time the truck went by—

THE COURT: He didn't know who was in the car, but somebody testified who the driver was and who the [119] passenger was.

All right. let's get on now.

Q (By Mr. Rinaldi) You indicated then that after the truck passed, that you were thinking about a time frame when it would probably return if it were involved in alien smuggling activities, is that correct?

A Yes, sir.

Q What kind of time frame were you thinking about or talking about?

A If it passed from our point heading west and then back east, is that correct? Is that what you're saying?

Q Yes.

A Approximately an hour and a half.

Q Okay. Did you assume that it would be possible for them to cover that distance in a shorter period of time?

A Yes, sir.

Q And so what were the parameters—

THE COURT: Parameters?

MR. RINALDI: Is that the wrong term?

THE COURT: The dictionary seems to think that's a mathematical term. Have you looked it up, if you ever tell—

THE WITNESS: No.

MR. RINALDI: No, I haven't.

THE COURT: I can't find it, if your talking [120] about perimeter, but parameter, unless you explained it to me, has a very complicated mathematical meaning. Try it sometime. Try to look it up. See what Mr. Webster says about it.

MR. RINALDI: I will.

THE COURT: I'll agree everybody is using it, particularly newspapermen. I don't know whether there's anything worse than that.

MR. RINALDI: Perhaps that's how I picked up the word, your Honor. Allow me to rephrase the question.

Q What were the limits of the time frame you expected a car would return if it were involved in alien smuggling?

A We expected the vehicle sometime from 2:00 o'clock until the hours just prior to daylight, which at this time was about 6:00 o'clock. As far as being in this pickup area, the pickup point, so this was our time span that we were actually looking for as far as from our point west and then returning east, we allowed approximately an hour and a half.

Q If, well, I don't want to ask you, would you agree with me that had the car come back in slightly less than an hour and half, you still would have suspected it?

A Yes, sir.

Q And in this instance when it came back slightly [121] more than an hour and a half, you expected it also?

A Yes, sir.

Q Now, what period of time are we talking about that this time frame which you felt was a suspicious time frame for a car going down the road and coming back? Would an hour have appeared suspicious to you?

MR. MUELLER: Your Honor, I object, speculative.

THE COURT: Yes, this is all speculative, I wouldn't allow it. The witness is saying the approximate time they figured out was about an hour and a half. Do you have another question?

MR. RINALDI: Yeah, I do.

Q You say the truck was proceeding at approximately 50 to 55 miles an hour, is that correct?

A Appeared to us, yes, sir, at a normal highway speed.

Q Would you agree with me then the truck could have covered the distance between the point you first observed it and the pickup point and returned to the point where you ultimately stopped it within an hour's time if it were driving at 55 miles an hour?

THE COURT: And if it didn't stop, you mean?

Q (By Mr. Rinaldi) That is correct.

A Yes, sir, with no difficulty locating the aliens and getting them right in the pickup, it's possible.

[122] Q Now, with reference to the aliens themselves, this stopping for aliens, isn't it true, Officer, that this whole time the aliens were from—all the evidence you had, the individuals coming up from Mexico were making a definite effort to obscure themselves and to keep from being observed?

A At what point, sir?

Q At all points from their trip from the Mexican border up to the highway. Would you agree with me they were making every effort—

THE COURT: You mean you want him to give his opinion as to what they were doing? You didn't see them, did you?

THE WITNESS: No, sir.

Q (By Mr. Rinaldi) Okay, based upon what you observed, that is the footprints, the fact that in your opinion they started and travelled at night, the fact that when they paralleled the road they did not walk on the road itself but were removed from the road where you indicated they were less likely and perhaps could not be observed by any individuals from the roadway at night. Based upon these observations did it appear to you they were trying to avoid detection?

A Yes, sir, the distance from the highway would—

Q And in your experience, do normally illegal [123] aliens try to avoid detection?

A Yes, sir, they do.

Q And in terms of stopping for the aliens, how much time were we talking about to load six people into a truck? Do you have an estimate or an opinion?

A No, sir, there again it would depend on what kind of traffic would be travelling the highway in that vicinity.

THE COURT: And I suppose how far away they were from the highway?

THE WITNESS: Yes, sir.

THE COURT: And where the car stopped and things like that?

THE WITNESS: Yes, sir, that would be correct generally.

Q (By Mr. Rinaldi) Do you have an estimate as to—

THE COURT: He wasn't there, Counsel. He said that the time an hour and a half was an approximate time that he figured. I think you're wasting time, Counsel. But go ahead and be my guest because I get paid at the end of the month.

Q (By Mr. Rinaldi) Do you have an approximation as to how much time it would take to load those aliens on the truck?

A Under what circumstances, sir? Under one cir-
[124] cumstance if there's no traffic, if they're right there at the highway, it wouldn't hardly take any time at all.

Q I believe you said that the tracks indicated that they were right there at the highway?

THE COURT: No, not they. He's talking about a different they at that time. He has no idea, he said before he didn't see them at all. First time he saw them was when the car was stopped.

Q (By Mr. Rinaldi) So then you have no idea actually how long it would in fact take?

THE COURT: How long in fact it did take?

Q (By Mr. Rinaldi) No, no, I'm asking him—

THE COURT: He said it only took an hour and thirty minutes according to their approximation.

Q MR. RINALDI: All right. And their approximation, what was it based upon, sir? I want to find out how he based that opinion, your Honor.

THE COURT: He's told us, but tell us again.

Q (By Mr. Rinaldi) Please, I'd like to hear it.

A It was based upon the area, general area that they would have to travel to. Also the possibility that the time it would take to exactly locate the aliens. Also we allowed for the fact this is a pretty level highway and pretty straight, therefore a vehicle stopping in the middle of nowhere on this highway would draw suspi-

cions, [125] therefore we didn't reason that this vehicle would stop if there was other traffic. That's why we gave this approximate time of an hour and a half.

Q So that you allowed then a half hour as leeway for them to stop without drawing suspicion, to locate the aliens and to ultimately load the aliens, is that a fair statement?

MR. MUELLER: I object, that could include time of slowing down during traffic, so forth.

THE COURT: Of course it could, Counsel. You're wasting time if you're trying to make an impression on me as to facts; I have time to waste, Counsel, so you be my guest, and eventually I have to approve your fee, don't I?

MR. RINALDI: I'm not sure if you do or not.

THE COURT: I'll make an effort to do it.

Q (By Mr. Rinaldi) Are there paddle markers along the road?

THE COURT: What?

Q (By Mr. Rinaldi) Paddle markers.

A Are you talking about a milepost marker?

Q That is correct.

A Yes.

Q And they're marked at mile increments, is that it?

[126] A Yes.

Q And is there a milepost marker 122 at the culvert?

A Yes, sir, there is.

Q And are those milepost markers clearly visible to vehicular traffic as they go down the road at night?

A Yes, sir, they are.

Q And it's not difficult to locate Milepost 122 at night by the marker, is that correct?

A Not for me it wouldn't be, no, sir.

Q Did you observe the eastbound traffic coming from Sells to Tucson during the hours of 4:00 and 6:00 o'clock in the morning on January the 31st, 1977?

A Yes, sir, we did.

Q And did you make note of all the vehicles that came through?

THE COURT: You mean a written note or mental note?

Q (By Mr. Rinaldi) Written note.

A No, sir.

Q Did you have any idea now as to how many were trucks or how many were vehicles which could have carried aliens?

A Do you mean within the scope of the description we were looking for, sir?

Q Yes.

[127] A None.

Q The only truck that came east on that roadway that could have carried an alien was Mr. Cortez' truck?

A That we were looking for, yes, sir, that's the only one.

Q Were there any other vehicles that could have carried aliens?

A Yes, there was sedans and open bed pickups and if there was other types I didn't really pay any attention, because of the fact that it didn't fit the description we were looking for.

Q And you made no attempt to stop those vehicles or determine whether they contained aliens?

A No, sir, we did not.

Q And correct me if I'm wrong, during this entire period of time it was dark that night, was it not?

A You mean except for the moonlight?

Q Yes.

A Yes, sir.

Q And as the cars went by can you determine how many people are in the back seat of a car?

A No, sir.

Q So in other words a sedan could have gone out there and picked up aliens and brought them right by, you'll never know?

THE COURT: That's what the other lawyer brought [128] out and he agreed.

MR. RINALDI: No further questions, your Honor.

THE COURT: You're talking about the moon, have you any idea what the phase of the moon was at that time and day, time of month? Or do you recall?

THE WITNESS: The best I recall, your Honor, is about half moon.

REDIRECT EXAMINATION

BY MR. MUELLER:

Q You were asked whether you were suspicious of the linen trucks that went from the east to the west. You said you weren't. Would you tell us why you wouldn't be?

A Well, sir, these are company trucks, and I assumed that they had to meet deadlines and also have their regular routes to where—as far as coming and picking up, using them for smuggling aliens, we didn't assume—we assumed that this was no way, unless the whole company would be involved.

Q You were asked questions regarding the traffic out of the Altar Valley and how you could see it from where you were located. Would you tell us what means you would have of detecting traffic out of that area and if you did at all?

[129] A Yes, sir. I testified before we do have a sensor field down in the Altar Valley which will let us know of certain activities in the Altar Valley, in the southern part of it.

Q How are you informed of any activity of that type? Sensor activity, I mean.

A It gives a signal to the Tucson office here and the radio operator then calls it out to the respective units.

Q Did you get any that night, do you recall?

A Yes, sir, we did. I don't recall the numbers. It was at that point we weren't interested in it until we got a further backup with more sensor hits.

Q And you didn't get those, apparently?

A No, sir, we didn't.

Q Did you make any traffic checks on that highway coming out of the Altar Valley?

A We saw a pickup, at that time we didn't know it was a pickup, but we saw a vehicle coming out of the Sasabe area while we were sitting up there. We just drove over onto the filling station down there at Three Points and observed it as it went by. Officer Evans recognized it as being from the general locality, so we didn't even stop it.

Q Mr. Velasco asked you about the tracks going from the cattle guard to the Tucson area. Do you know if [130] the tracks went between those two points?

A Not the tracks that I tracked, sir. Little Tucson is south of Highway 86, and these did not go south to Little Tucson.

Q Did they—they came from the south, though, didn't they?

A Yes, sir, from a point west of Little Tucson.

Q Is Little Tucson shown on that map?

A Yes, sir.

Q How far is the path you're familiar with from Little Tucson?

A That path I'm familiar with, sir, is approximately three to five miles west and north.

Q What is the nature of the—or would you describe the habitation along the highway from Milepost 149 west to 122?

A Very little, sir. Approximately Milepost 121 there's a couple of houses sitting on the north side of the highway right close, but it's very limited, very little housing.

Q Do you know of any others along that stretch of highway?

A No, sir, I don't.

Q How many vehicles did you stop that morning between 1:00 o'clock and 6:15?

[131] A One, sir.

Q Which one was that?

A Mr. Cortez' pickup.

MR. MUELLER: That's all I have, your Honor.

THE COURT: Any recross?

MR. VELASCO: No, your Honor.

THE COURT: Thank you.

MR. MUELLER: Call Agent Evans in next, your Honor.

RONALD EVANS,

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q State your name, please.

A Ronald C. Evans.

Q And your occupation is?

A U.S. Border Patrol agent.

Q How long have you been with the Border Patrol?

A About two years and four months.

Q Have you had any prior law enforcement experience?

A Yes, sir, I have.

Q What was it, briefly?

[132] A I was a city policeman in Ohio for three years and deputy sheriff for continuing three years, total of six prior.

Q How long have you been stationed in the Tucson area?

A Since November '74 I came on duty.

Q That's your entire experience with Border Patrol?

A Yes, sir.

Q And during the early morning hours of January 31, 1977, were you on duty?

A Yes, sir, I was.

Q Where were you located from say 1:00 o'clock until 6:15?

A I was located at a point with my partner, Agent Gray, at approximately Milepost 149 on Highway 86. It would be just west of Three Points.

THE COURT: Did you say 1:00 a.m. or 1:00 p.m.?

THE WITNESS: He said from 1:00 a.m. area.

MR. MUELLER: To 6:15.

THE COURT: Thank you.

Q (By Mr. Mueller) Was a—did you observe any vehicles going from the east to the west while you were there?

A Yes, sir, we did.

Q Were there any that you made special notice of?

[133] A Yes, sir, two.

Q Would you describe those two to the best of your recollection?

A The first one that we were concerned with came past about 4:30 in the morning. That was a greenish-yellowish what I described it as a pickup truck with a camper cap and then about fifteen minutes after that another pickup went by with a large, I would say, a wooden homemade type camper thing on the back.

Q Do you recall the color of those?

A No, sir, I don't.

Q How do you recall the color of the first one?

A I was standing there watching it at the road.

Q Wasn't it dark?

A Yes.

Q Was there any light?

A There was some moonlight, yes.

Q Were you closer to the vehicle than your partner?

A Yes, I was.

Q Did you pay attention to the license number?

A No, sir. We had that pre-arranged how we would handle that.

Q How is that.

A I took it upon my duties to get the description of the vehicle as best I could and my partner was to try [134] to get a license number.

Q And did you later stop a vehicle?

A Yes, sir we did.

Q Did it compare to either of these two?

A Yes, sir, it was the one we believed to be the first vehicle that went east that, the one about 4:30 in the morning.

Q The one you described as what color?

A It was a greenish-yellow with a camper cap.

Q After this vehicle was stopped, do you recall what you did?

A Yes, sir. Well, we—you mean after he was stopped?

Q Yes.

A After he was stopped—my partner was driving our vehicle, he exited ours, I got out—

Q Okay, what did you do?

A I just got out of the right-hand side to more or less oversee the situation and to protect my partner while he handled the situation.

Q Did you draw any weapons of any kind?

A No, sir. I had a shotgun.

Q Where was it?

A The shotgun, I had it about like a port arms. I was standing right behind the right passenger door of [135] our vehicle.

Q Were the lights to your vehicle shining on the other one?

A Yes, sir.

Q Were any lights shining back at you?

A Any lights shining back at us?

Q At you.

A No.

Q In other words, were you in any light of any kind?

A No, I was more or less in the darkness.

Q Okay. Then tell us what did you do?

A Okay, I, my partner—

Q Just tell me what you did. Try to limit, if you have to refer to what he did, please limit it.

A Okay, after my partner finished his conversation with the driver, I approached the passenger side of the truck that we had stopped and found a subject sitting in the right front seat.

Q What did you do with regard to that person?

A I knocked on the side window and he just set there looking straight out the windshield and finally opened the door and said, "Good morning, U.S. Border Patrol," and he just sat there looking, and I asked him his citizenship and he finally looked at me and said to me [136] he was illegal, or a citizen of Mexico, and I asked him to come out of the truck.

Q Before you went up there to the passenger side did you see the rear door of the camper open?

A Yes.

Q Did you notice if anyone was in there?

A Yes, sir.

Q What did you notice?

A Six illegal aliens.

Q After you talked to the man in the passenger side, did he make a declaration of alienage, citizenship?

A Yes, he admitted he was a citizen of Mexico.

Q Did you do anything else or talk to him about anything else?

A No, we just went, we moved to the rear of the vehicle area where my partner had the driver of the truck and advised the subjects of their rights.

Q Did you check any shoes or anything?

A Yes, sir, he had a bag—well, when we got out, he had a bag he was sitting there, had between his legs and it was a canvas-type satchel, I believe, that had clothes in it.

Q Did you check shoes?

A Yes, sir.

Q What he might have been wearing, where were you [137] when you did that?

A I was right at the side of the pickup truck.

Q How did you do that?

A Okay, my partner asked me, requested me that I check the shoe soles. I had him raise his feet up and I looked at the chevron design and we knew that was the man we were looking for.

Q I'd like to have you see Government's Exhibit 1. It's right in front of you there. It's a photograph. Do you recognize what's shown in that photograph?

A Yes, sir, I do.

Q What is it?

A It's the same shoes as the one subject was wearing that morning, the chevron design.

Q Did you have occasion to check the contents of the bag you spoke about?

A Yes, sir, I did.

Q What did you find in that?

A I found a jacket, a change of clothes, and a flashlight.

Q Any batteries?

A I honestly don't remember if there was batteries.

Q Fine. Was the flashlight in working order?

A Yes, sir, it was.

MR. MUELLER: Thank you, that's all I have.

[138] THE COURT: Cross.

CROSS EXAMINATION

BY MR. VELASCO

Q Before you stopped the vehicle could you see the chevron shoes or the flashlight?

A Excuse me, sir?

Q Before you stopped the vehicle could you see the shoes or flashlight?

A Before we stopped it?

Q You had never seen it before?

A The chevron shoes?

Q Yes.

A I had never seen them myself.

Q And the same thing for the flashlight?

A Not before we stopped it.

MR. VELASCO: I have no other questions.

CROSS EXAMINATION

BY MR. RINALDI:

Q When the vehicle—when the first vehicle which you suspected passed your observation post at 4:30 on January 31, 1977, you indicated that the vehicle was greenish-yellow, is that correct?

A I believe that's what it was at the time.

[139] Q Was there anything outstanding or unusual about the camper on the back of the vehicle?

A No, sir, not at the time.

Q Did it have a corregated finish or was it level finished, do you recall any of the details?

A Due to the darkness I couldn't recall, I just knew it was a camper type cab.

Q Did it have windows on the side you observed?

A Yes.

Q And that it had a window in the back?

A I don't recall that, I don't remember seeing that. I just knew it was a camper.

Q Later, though, when you saw it the second time, you did observe it had a window in the back?

A Yes, sir.

Q Approximately how far were you from the roadway when you observed the vehicle?

A Well, I was right at the side of our cruiser, or our vehicle, and it was maybe no more than a hundred feet off the road, I don't think it was even that.

Q And you indicated to me that you were closer to it then your partner?

A I haven't indicated that to you, sir.

Q Well, were you closer than Mr. Gray?

A To our vehicle.

[140] Q Were you closer to the vehicle which you were observing?

A No, my partner was out near the road.

Q When you said you were closer to the vehicle, you meant you were closer to your own vehicle?

A Yes, sir.

THE COURT: What kind of a vehicle were you close to? You said it was a cruiser?

THE WITNESS: I commented it's a cruiser. We were in a Dodge Ram Charger.

THE COURT: A Dodge?

THE WITNESS: Ram Charger.

THE COURT: Was it marked?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) When your partner returned after the vehicle had passed, did you have a conversation with him?

A Passed east or west?

Q Passed going to the west, the first time you saw it?

A Yes, sir.

Q At that time did he indicate to you whether he had seen the license or not?

A Yes, sir, he did.

Q What did he indicate to you?

[141] A He said, "Well, all I could get was GN88."

Q GN what?

A GN88.

Q Now, at 6:15 when the vehicle came back, do you know for a fact whether that was the same vehicle which you had seen an hour and 45 minutes earlier?

A Well, it came back a little prior to 6:15, but there was no doubt in our minds it was the same one.

Q Do you know if it was in fact the same vehicle in question?

A I don't think I could correctly answer that. That was—when it passed we pulled out behind it and there was no doubt in my mind because I had the description of it.

Q Okay. Now, after you stopped the car or the truck and pulled it over to the side of the road, I believe you indicated that the driver of the truck came out and walked to the back of the truck.

A Yes, sir, he did.

Q And your partner was driving your patrol vehicle at the time?

A Yes, sir.

Q And your—

THE COURT: At the time the other man walked back?

Q (By Mr. Rinaldi) At the time you stopped the [142] vehicle was your partner driving the patrol vehicle?

A Yes, sir.

Q And you were riding in the passenger side?

A Yes, sir, I was.

Q Okay. Now, your partner got out of the car and walked forward to the back of the truck, is that correct?

A Yeah. Well, it was in-between our vehicle and the truck.

Q How far did your vehicle stop behind the truck?

A No more than a carlength I wouldn't believe.

Q Now, you remained behind the right front door, is that it?

A Yes, sir, with the door open and outside of the vehicle.

Q And what occurred between your partner and the driver? Did they subsequently meet behind the truck?

A Yes, sir.

Q And they met somewhere between your car and the back of the truck?

A Yeah, it was more or less probably right at the back of the truck or just a little bit behind it.

Q And can you relate to us what happened then?

A Well, I knew what my partner said.

Q What did he say?

A He said, "Good morning." He said, "U.S. Border [143] Patrol. How are You?" Something like that. Or just about that same words, and—

Q Did you hear a response?

A Yeah—he didn't say anything. He just started quiverring. And I know Wayne—and I know Agent Gray asked him, "Are you a citizen of the United States, sir?" And I remember him saying yes.

Q He responded that he was?

A Yes.

Q Did your partner ask him for any identification?

A No, not at the time.

Q Is it standard operating procedure to ask for papers when someone indicates they're a citizen or do you just take them on their word?

A No, we more or less take them on their word.

Q So if you stop somebody and he says, "I'm a citizen," you don't question them any further in reference to citizenship?

A If we would have reason to believe he would be lying to us.

Q What happened next?

A There was some words exchanged and what they were exactly between the driver and my partner I don't know. He just reached over and opened up, it's a half window-type thing on the camper, he just reached, opened that up.

[144] Q Who reached over?

A The driver.

Q And you say that there were some words exchanged between your partner and the driver, but you don't know what they were?

A No, I don't.

Q Do you have any idea what the conversation related to or did you hear who initiated it?

A I would assume it was my partner—

THE COURT: No, I think the lawyer wants to know whether you heard it so you could tell us what it was. You don't want him to assume what it was?

MR. RINALDI: I don't really mind.

THE COURT: All right, he wants you to tell what you assume happened.

THE WITNESS: Well, I assumed normal procedure when we would stop a vehicle, we would ask them if they have any passengers with them.

Q (By Mr. Rinaldi) And then what?

A And normally a driver would say yes or no or whatever.

Q And if they indicate they do have passengers, what's the next procedure?

A You would normally talk to them, determine if they're aliens.

[145] Q Under what circumstances would you look into the back of a truck?

THE COURT: This man or the other man?

Q (By Mr. Rinaldi) Under normal operating procedures.

THE COURT: This man or the other man?

MR. RINALDI: This man.

THE COURT: Well, he hasn't said he did. This man said he was standing by his truck.

Q (By Mr. Rinaldi) So in other words you heard the first part of his conversation when he asked him what alienage he was and after that you couldn't hear any more of the conversation?

A No, I couldn't hear exactly what it was.

Q And you don't know whether your partner ordered the driver to open the—

THE COURT: Am I going to hear testimony on that, Counsel? Because the other driver said no, it was the other man who ordered.

MR. RINALDI: I believe you will.

THE COURT: Will I?

Q (By Mr. Rinaldi) You don't know whether the driver was ordered to open the truck or whether—the rear of the truck—or whether he did it of his own volition?

A No, sir.

[146] THE COURT: That's all, gentlemen?

MR. MUELLER: I have a couple.

REDIRECT EXAMINATION

BY MR. MUELLER:

Q Did Agent Gray at any time remove his revolver from its holster?

A No, sir.

Q Was he carrying any weapon other than that?

A No, sir.

Q Is this the only vehicle that you and he stopped that morning?

A No, we—Yeah, that was the only one.

MR. MUELLER: That's all I have.

THE COURT: Will you tell me what a Dodge Ram Charger looks like? I haven't the vaguest idea. Am I using the right term, Ram? Does it look like a—

THE WITNESS: Looks like a Chevrolet Blazer, four-wheel drive, like a pickup truck without the small cab, it's a continued-type top.

THE COURT: Was that parked vertical to the road, parallel to the road?

THE WITNESS: Vertical.

THE COURT: How far was the front of the car from the roadbed?

[147] THE WITNESS: Within a hundred feet, your Honor, sitting right on the cattle guard.

THE COURT: Was it a marked automobile?

THE WITNESS: Yes, sir.

THE COURT: And by marked you mean it had the color blue and then it was red lights on it?

THE WITNESS: We have the standard Border Patrol color, white top with the green main body, decals of U.S. Border Patrol on each door, siren and red lights.

THE COURT: What is your recollection that the phase of the moon was in that night?

THE WITNESS: I believe it was somewhere around half to three-quarters.

THE COURT: Thank you, You may step down, sir.

Are there any other questions?

MR. MUELLER: No, your Honor.

THE COURT: Thank you.

MR. RINALDI: Just one other question.

RECROSS EXAMINATION

BY MR. RINALDI:

Q Was it a cloudy night night night?

A No.

Q I believe it had been raining the night before?

A Yes, sir, three nights before.

[148] Q But the clouds had all cleared by then?

A As near as I can recall.

Q And they didn't obscure the moon?

A No.

Q One final thing. With reference to the vehicle, it was parked a hundred feet off the road.

A Our vehicle?

Q Yes.

A Within a hundred feet or right in that area.

Q Was there a reason for that?

Q Yes, sir, so we could observe two different locations, we could observe traffic passing by on 86 and also we could see a vehicle leaving Altar Valley.

MR. MUELLER: I'm sorry, he didn't get a chance to finish his answer.

THE WITNESS: So we could notice any vehicles that could possibly come from Sasabe area on Sasabe Highway, we can see the headlights.

Q (By Mr. Rinaldi) Was it clearly visible from Highway 86?

A Yes.

MR. RINALDI: Thank you, sir.

THE COURT: All right, Sir, thank you.

MR. MUELLER: With that the Government rests, your Honor.

[149] THE COURT: Any witnesses, gentleman?

MR. VELASCO, do you want to call a witness?

MR. VELASCO: Yes, your Honor.

Call the defendant Mr. Pedro Hernandez-Loera.

PEDRO HERNANDEZ-LOERA

having been first duly sworn, testified on his oath through the interpreter as follows:

DIRECT EXAMINATION

BY MR. VELASCO:

Q Mr. Hernandez, you are the defendant in this case, are you not?

A Yes.

THE COURT: Excuse me, can you speak English?

THE WITNESS: No.

THE COURT: A little, maybe?

THE WITNESS: No.

Q (By Mr. Velasco) On the night of January 31, 1977, the vehicle that picked you up, what was its direction of travel?

A In relation to where the sun comes out or sets?

Q Yes.

A It came from where the sun sets to where the sun rises.

[150] Q Did you ever see that truck or vehicle travel from east to west.

A No.

MR. VELASCO: No further questions, your Honor.

CROSS EXAMINATION

BY MR. MUELLER:

Q For what distance did you see the truck travel before you—during the time that you saw this vehicle that picked you up, how much distance did you watch it?

A I couldn't tell you.

Q Did you just see it very briefly before you got in?

A How's that?

Q Did you see it just for a short period of time before you got into it?

A Very little, only while it arrived.

MR. MUELLER: That's all. Thank you.

THE COURT: I must confess, gentleman, I haven't the vaguest idea what transpired. I'm sorry, Mr. Velasco, I didn't understand your questions or the answers of the witness, nor when Mr. Mueller asked questions. I don't need your help now, Mr. Rinaldi.

MR. RINALDI: I wanted to ask him some questions.

THE COURT: You may when I finish.

[151] May I ask, Mr. Velasco, did you ask him to describe what direction the car that stopped him was going?

MR. VELASCO: No, your Honor, the vehicle which picked him up. I asked him the direction of travel.

THE COURT: Maybe that's what confused me, the vehicle that picked him up, there's been no testimony that he was picked up by any vehicle, the only vehicle I heard was that he was found in a vehicle.

MR. VELASCO: Well, let me clarify that.

REDIRECT EXAMINATION

BY MR. VELASCO:

Q Were you, Mr. Hernandez, picked up by a vehicle on what is called the Sells Highway?

A Yes.

Q What kind of vehicle was it?

A A pickup.

Q And this pickup, in what direction was it travelling?

A From east to west.

Q And that's the direction it picked you up?

A The truck was coming from the east to the west.

Q And you're saying that it was coming from the direction where the sun rises to where the sun sets?

A It was coming from where the sun sets to where [152] the sun rises.

Q The vehicle that picked you up, did it ever change direction of travel?

MR. MUELLER: I object to the form of the question as to time frame.

THE COURT: You mean after he picked him up.

MR. VELASCO: Let me rephrase it.

Q From the time you first observed the vehicle, did it ever change directions?

A No, it continued in the same direction.

MR. VELASCO: I have no other questions.

THE COURT: Cross?

RECROSS EXAMINATION

BY MR. MUELLER:

Q You only saw this truck, pickup truck, a few seconds before you got into it, is that correct?

A Yes.

MR. MUELLER: That's all I have.

THE COURT: Mr. Rinaldi?

CROSS EXAMINATION

BY MR. RINALDI:

Q Is this the same truck you were arrested in?

A Yes.

[153] THE COURT: Thank you, sir.

That's all, gentleman?

MR. RINALDI: I'd like to call the defendant, Mr. Cortez.

THE COURT: All right.

JESUS CORTEZ-ESPINOZA

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. RINALDI:

Q Were you driving your—do you own a truck?

A Yes.

THE COURT: Excuse me, do you speak English?

THE WITNESS: Yes, sir.

THE COURT: You write English quite well?

THE WITNESS: Yes.

THE COURT: Is this your handwriting on this form here?

THE WITNESS: No.

THE COURT: It's not your handwriting. This is not your signature, is it?

THE WITNESS: Yes.

THE COURT: The signature is yours, and the [154] date, is that yours, too?

THE WITNESS: Yes.

THE COURT: Do you speak English quite well or just a little bit?

THE WITNESS: Little bit, sometimes I can understand.

THE COURT: Well, we will try him in English first, and if he has difficulty ask the lady to help him.

MR. RINALDI: Fine.

THE COURT: How long have you been a resident here in the United States?

THE WITNESS: About twelve years.

THE COURT: Shall we try it?

MR. RINALDI: Sure.

THE COURT: Just for size?

Q (By Mr. Rinaldi) Do you own a vehicle?

THE INTERP: Excuse me, your Honor, may I go back and translate for the other defendant?

THE COURT: Maybe Mr. Valesco will do that, we're doubling in brass.

Q (By Mr. Rinaldi) Do you own a vehicle?

A Yes, sir.

Q What kind of a vehicle?

A 1973 pickup, Chevy.

Q Did you drive your vehicle on Highway 86 on [155] January the 31st, 1977?

A Yes, sir.

Q Would you describe for the Court where you were coming from that night? Prior—were you arrested at any time during that evening?

A I was coming from Casa Grande.

Q And before that?

A From Phoenix.

Q And after leaving Phoenix, what route did you take?

A I took that 10, Freeway Ten, to Case Grande.

Q And from Casa Grande which way did you go?

A I don't know what's the number here, little road, but I can show you on the map.

THE COURT: He can show you the map, but he doesn't know the number of the road he says.

Q (By Mr. Rinaldi) Fine, I didn't hear his response.

Would you tell me on the map approximately where the road goes?

A Across.

THE COURT: That's not a good map I don't think.

Q (By Mr. Rinaldi) Casa Grande would be—

A This is Sells, right?

Q Yes.

[156] A There's a little corner, where we find the road to go to Ajo, this is the road to go to the mines, the mine, I don't know the name of the mine here between Casa Grande and—

Q Would it be this one right here that's marked 98? Milepost 98? Pojeto?

A I believe it is.

Q So you drove to Casa Grande and then drove from Casa Grande on a small road down to Highway 86?

A Yes, sir.

Q And you came to Highway 86 just to the west of Sells?

A Yes, sir.

Q After you reached Highway 86, which direction did you turn?

A Well, the way to go to Sells.

Q Okay, would that have been to the left or to the right?

A The left.

Q And then after you turned to the left did you pass through Sells?

A Yes, sir.

Q And ultimately did you meet Mr. Hernandez-Loera, or pick up Mr. Hernandez-Loera that evening?

A This was after Selis, on the way to Tucson.

[157] Q About how many miles would that have been to the east—that would have been to the east of Sells, is that correct?

A Yes.

Q About how many miles east of Sells?

A It's about five or six miles, seven, somewheres.

Q After you picked up Mr. Loera did you proceed on toward Tucson?

A Yes.

Q Were you stopped by the police? Or by the Border Patrol that evening? That morning?

A If I stopped?

Q Well, did the Border Patrol stop you?

A Yes.

Q Had you ever passed from Tucson west to Sells?

A No, sir.

Q That morning?

A No, sir.

Q After you were stopped, did you get out of your truck?

A Yes, sir.

Q Would you tell me what happened?

A Well, he told me there was a Border Patrol officer, then I took my driver's license out. He asked me if I was a citizen, I said, "Yes, I am."

[158] Q Did you show him your driver's license?

A Yes, sir.

Q Then what happened?

A And then he told me, "What do you have in your camper?" And I said, "Well, I want to tell you the truth, there was this man hijacking, and this other man's came,

came out of the bushes, and they went in the truck, in the pickup, in the back of my pickup, in the camper."

Q Did he ask permission to look in the truck?

A He told me to open the camper.

Q And did you open it?

A Yes.

MR. RINALDI: No further questions, your Honor.

CROSS EXAMINATION

BY MR. MUELLER:

Q You say you told him you were a citizen of the United States?

A Yes, sir.

Q You're not, are you?

A No, I am immigrant.

Q I can't hear you.

THE INTERP: I am an immigrant, he said.

Q (By Mr. Mueller) Why were you lying to him then?

A Well, I was, I thought it was Highway Patrol.

[159] Q You lie to the Highway Patrol but not to Immigration?

A No, no, I thought it was Highway Patrol at first and I took my driver's license.

Q Why did you tell him—

A After that when he asked me, when he told me, when he told me he was a Border Patrol, after that he didn't ask me no more nothing, just put me in.

Q You didn't volunteer the fact you were an immigrant?

A No, I lied, I say I am an American citizen.

Q What kind of card do you have, green card, resident alien card?

(Explained by interpreter.)

A The green card, resident alien.

Q Do you have it with you?

A Yes.

Q Could I see it?

MR. MUELLER: May I see it, Your Honor, Does the Court want to see it?

THE COURT: Better mark it then or something.

MR. MUELLER: I didn't want to put it in evidence.

THE COURT: If you don't want to put it in evidence, I don't want to look at it.

[160] MR. MUELLER: I didn't want to take it from him.

Q What kind of a—what's the color of your truck, this '73 Chevy pickup?

A It's green.

Q What color green? What shade green?

A It's more dark than light.

Q More?

THE INTERP: More dark than light, he said.

Q (By Mr. Mueller) Is it as green as Mr. Hernandez' shirt here?

A No. It would be lighter than that.

Q Is it as green as this man's jacket here?

A No.

Q Lighter than that?

A No, darker than that.

MR. RINALDI: I object, I don't think the man's jacket is green.

THE COURT: Terrible to hold your mouth.

Q (By Mr. Mueller) Do you know the license number of your truck?

A I don't remember. I know the number is 8804.

Q Are the first two letters CN?

A I believe it is.

MR. MUELLER: That's all I have, your Honor.

THE COURT: Anybody else?

[161] MR. VELASCO: I have no questions.

MR. RINALDI: Nothing, your Honor.

THE COURT: I'm afraid I didn't hear you when you were asked by your lawyer about who was in the camper. Was there anybody in the camper?

THE WITNESS: When they stopped me? When the Border Patrol—

THE COURT: On the night or morning of January 31st of this year when you were stopped, yes.

THE WITNESS: Yes, sir, there was, there was some mens in there.

THE COURT: There were some what?

THE WITNESS: Some people in there.

THE COURT: Some people in the car?

THE WITNESS: In the camper.

THE COURT: How did you say they got in? Or did you say?

THE WITNESS: When I stopped to pick up Loera, Mr. Hernandez, and these other mens came from the bushes, from the small trees, and they don't even ask me if I give them a ride.

THE COURT: They came from the bushes?

THE WITNESS: Yes, sir, at the side of the road.

THE COURT: And why did you say—what did you say to Mr. Hernandez about that?

[162] THE WITNESS: When I stopped for him he was asking for a ride, you know.

THE COURT: Yes, I understand, he was just a pickup, you didn't know him at all.

THE WITNESS: Mr. Hernandez.

THE COURT: Who are you talking about? Aren't you talking about Hernandez?

THE WITNESS: Yes.

THE COURT: That's the man I'm talking about.

THE WITNESS: I stopped to pick up him.

THE COURT: Did you know him, I said. Did you know him beforehand or was he just a hitchhicker?

THE WITNESS: Yes, I know him before.

THE COURT: Oh, you know him before?

THE WITNESS: Yes, just once.

THE COURT: And this was late at night, was it?

THE WITNESS: No, no, there was, I think it was before Christmas I went to Nogales.

THE COURT: No, that's when you knew him once before?

THE WITNESS: Yes.

THE COURT: But I mean on this day when you picked him up was that late at night when you picked him up?

THE WITNESS: It was 5:30 o'clock in the morning. [163] I'm not sure.

THE COURT: Did you have an appointment with him?

THE WITNESS: He called me the afternoon that if I can do a favor for him and I said, "What do you want?" You come back—

MR. RINALDI: Your Honor, with all due respect, I'm not sure what this has to do with anything in this case.

THE COURT: Well, you can—if you want to make that an objection—do you?

MR. RINALDI: Yes.

THE COURT: We'll record it, yes.

MR. RINALDI: I mean I think he has a limited right to testify to those matters relevant to the matters before the Court.

THE COURT: You didn't say that when you asked him to testify, you didn't tell me you were offering him only for a certain amount of time or purpose, did you?

MR. RINALDI: I think the motion speaks for itself, your Honor.

THE COURT: I said you didn't tell me it was only offered for a limited purpose. You did say these men came

into his car without his permission and unknown to him as to why they were there. So I'm inquiring now about all of those. But you may record your objections which I think you had already.

[164] MR. RINALDI: Well, my position is basically—

THE COURT: We understand what your position is.

MR. RINALDI: That his testimony can't be used against him.

THE COURT: I know it can't be and that's because the Supreme Court said it couldn't.

MR. RINALDI: What I'm curious to know is is Mr. Mueller presenting it or is the Court?

THE COURT: I don't want to argue with you now, shut up.

MR. RINALDI: Thank you, your Honor.

THE COURT: Now, you were telling me about this man called you sometime in the afternoon to do him a favor.

THE WITNESS: Yes, sir.

THE COURT: What favor did he ask?

THE WITNESS: Just to pick up him.

THE COURT: Pick him up?

THE WITNESS: Yes, sir.

THE COURT: Did he tell you where?

THE WITNESS: He told me just by Sells, I don't know. He didn't tell me the right direction.

THE COURT: And you left from Phoenix to pick him up?

THE WITNESS: No, no, not just for him. My wife and I went to a dance last—the night before, and [165] we went home and we started, you know, arguments with the man, she went to bed and I took my truck and I went, I went out of the house, and I was going to go to Nogales, then I remembered that he was called me, he called me, so, well, I can take him back over to Nogales. Because it's the way I was going.

THE COURT: And that's how you found him?

THE WITNESS: Yes, sir.

THE COURT: Now, my question was, did you tell him when he got in the car about these men that had got in the back of the car?

THE WITNESS: Did I tell him?

THE COURT: That was the question I asked, yes.

THE WITNESS: No, he didn't tell me nothing. The mens came out of the bushes.

THE COURT: Yes, but did you tell him you knew some men got out of the bushes and got into the camper, did you tell him that?

THE CLERK: Yes.

THE COURT: What did he say?

THE WITNESS: If I can give him a ride, and I say, "Well, they're in the truck already." I was kind of scared, too, I don't know how many mens were in there.

THE COURT: How long were they in the truck before you were stopped by the government?

[166] THE WITNESS: It was—it was not too far, I don't remember, I believe about ten, eight or ten, fifteen miles, when he stopped me.

THE COURT: You had never seen them before, I guess?

THE WITNESS: No, sir.

THE COURT: All right. Anybody else?

MR. MUELLER: No, your Honor.

MR. VELASCO: No, your Honor.

THE COURT: Thank you, sir, you may step down.

Anybody else? Do you rest your case, Mr. Velasco?

MR. VELASCO: Yes, sir, I rest my case.

THE COURT: Mr. Rinaldi, do you rest?

MR. RINALDI: Yes, I rest.

THE COURT: Any rebuttal? Motion denied, exception.

MR. VELASCO: May we be excused, your Honor?
THE COURT: Thank you, yes.
MR. RINALDI: Thank, you, your Honor.

* * * * *

CERTIFICATE

STATE OF ARIZONA

COUNTY OF PIMA

I, DAVID W. HANDY, hereby certify that I am an official court reporter in the United States District Court for the District of Arizona, and that as such reporter I attended the proceedings in the foregoing-entitled cause and took down in shorthand all proceedings had and testimony addressed; that the same was reduced to writing under my direction and that the foregoing 166 typewritten pages contain a true and correct transcript of my shorthand notes as taken.

IN WITNESS WHEREOF I hereto set my hand this 1st day of June, 1977.

/s/ _____
DAVID W. HANDY
Official Court Reporter

Supreme Court of the United States

No. 79-404

UNITED STATES, PETITIONER,

v.

JESUS E. CORTEZ AND
PEDRO HERNANDEZ-LOERA

ORDER ALLOWING CERTIORARI. Filed June 9, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NUMBER 79-404

UNITED STATES OF AMERICA,

Petitioner

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA, pursuant to Rule 53, Supreme Court Rules and Title 18, United States Code, §3006A(d)(6), respectively, moves this Honorable Court for leave to file the attached response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent the Respondent in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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IN THE

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UNITED STATES OF AMERICA,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEDRO HERNANDEZ-LOERA
and
JESUS E. CORTEZ

Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA, by and through their counsel undersigned, respond to the government's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 595 F.2d 505.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This response is filed pursuant to Rule 24(1) of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

A generalized suspicion of criminal activity is insufficient to justify a founded suspicion seizure when the particular person or vehicle stopped has not engaged in any suspicious activity.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ."

STATEMENT

I. On January 31, 1977, Messrs. Jesus Cortez and Pedro Hernandez were traveling east on State Highway 86 (RT 149, 155-157). They were stopped by two Border Patrol officers who intended to search the vehicle for aliens (RT 94-96). When the vehicle was stopped, Officer Evans secured the site with his shotgun and Border Patrol Officer Gray advised Mr. Cortez that he was conducting an immigration check and ordered him to open the camper door (RT 158).

As a result of the stop and subsequent search, the defendants were arrested for transporting aliens. The evidence derived from the stop was the aliens, their testimony, the physical evidence of Mr. Hernandez's chevron shoe design and a flashlight (RT 85, 101, 138).

At the time of the stop the officers had no information this particular vehicle was occupied by or used for the purpose of transporting aliens (RT 95-96, 101). On the contrary, the officers were without any information alien activity was afoot either at the observation point or the suspected recovery area.

The officers' decision to stop the vehicle was based upon several assumptions regarding suspected alien activity and the type of vehicles used to transport aliens.

The alien activity originated near San Miguel, Arizona, at the International Border. The officers had tracked various groups of aliens across the 27 miles of desert from the border to State Highway 86. The officers' observations led them to believe the aliens who travelled at night were led by a guide wearing a shoe with a chevron-designed sole[1]. The aliens were recovered between Milepost 119 and 122 on State Highway 86. The officers believed the aliens were recovered by a motor vehicle.

The officers were looking for any vehicle capable of transporting 8 to 20 aliens (RT 74). They were also looking for a vehicle which would not arouse suspicion of criminal activity[2] (RT 74). For these reasons, the officers decided to look for campers, vans, pickups and other vehicles capable of carrying the proposed 8 to 20 people[3] (RT 77). In an effort to narrow the vehicles subject to suspicion, the officers focused their observation to vehicles traveling east to west past their point and returning within one and one-half hours (RT 76, 94-96). During their surveillance, the officers were positioned at Three Points, Arizona. (See Map attached as Exhibit A)

Officer Gray twice testified the recovery vehicle would be going west to east (RT 68-69, 105). The agents theorized the aliens were walking towards their eventual destination, which for this particular route was Tucson, Arizona (RT 104-105). The officers did not believe the aliens would walk towards the oncoming recovery

---

[1] Although the officers had no idea what time movement across the International Border began, they theorized it occurred no earlier than 6:00 p.m. All movement was therefore under cover of darkness. The projected rate of travel was two and a half to three miles per hour. The aliens would take 8 to 12 hours to reach their destination, i.e., between 2:00 and 6:00 a.m. If the aliens had crossed the border before 6:00 p.m., they would have departed Highway 86 before the officers commenced their surveillance (RT 73, 105-106).

[2] Although commercial vehicles such as Haskell Linen trucks would not attract attention, the officers did not feel these vehicles would be engaged in unlawful conduct because of an assumed company policy prohibiting illegal activity (RT 74, 114, 128).

[3] The officers admitted almost any vehicle could have carried the required number of aliens (RT 127).

vehicle in order to see it approach their positions. Instead, the agents believed the vehicle would approach the aliens from behind (RT 68-69, 98, 104-105). But this belies Officer Gray's testimony that:

> "Q And did you make any inferences from their direction of travel of the foot traffic to the east with regard to what direction the vehicle may have taken?
>
> A Yes, sir. We assumed that because the aliens were walking in an eastward direction after hitting the highway that apparently the vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction." (RT 68-69)
>
> * * *
>
> "A I don't suppose it would be conclusive they're going east, no.
>
> Q So it would be possible, it would be fair to say, would it not, that a person walking west to east at night --
>
> THE COURT: In the desert.
>
> Q (By Mr. Velasco) In the desert on this highway or off the highway would be doing so so he could keep an eye on a vehicle travelling east to west or look for a vehicle travelling east to west?
>
> A No, sir, that doesn't make much sense to me. If they're going eventually going to go the opposite direction, why --"

II. Upon this evidence the district court denied, without discussion, the defendant's motion to suppress (RT 166). The court of appeals reversed, holding the officers lacked reasonable suspicion justifying the seizure. The Ninth Circuit reversed stating:

> "The founded suspicion test plainly requires balancing of the facts of the particular case . . . Founded suspicion requires some reasonable ground for singling out the person stopped as one who was involved . . . in criminal activity . . ." United States v. Carrizoza-Gaxiola, 523 F.2d 239, at 241 (9th Cir. 1975).

The court of appeals found too many innocent references to be drawn from the defendant's conduct and no references connecting them with any illegal activity so as to make the "officers

suspicions reasonably warranted."

Judge Chambers, dissenting, found a strong possibility that "Chevron" would bring aliens to the highway for recovery by a vehicle. He erroneously asserts the officers "assumed that the group would be walking toward and not away from the pickup vehicle--and toward and not away from their ultimate destination." The agents rejected the former proposition while accepting the latter (RT 68, 105).

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly concluded the Border Patrol officers lacked reasonable and articulable suspicion justifying the investigatory stop of the vehicle. The court's conclusion is consistent with the standards established in Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

The court's decision was appropriate on the facts and upon the applicable law. The Border Patrol agent's theory of apprehension had too many deficiencies to rise to the required level of a reasonable founded suspicion. A separate examination of the facts and law will clearly reveal the appropriateness of the Ninth Circuit's reversal. A factual analysis is presented first and will be followed by a discussion of the applicable law.

If the Border Patrol agents were correct in their assumption that the recovery vehicle would come from behind the aliens, the aliens would have been recovered and traveled to Tucson without any suspicion on the part of the officers.

If the vehicle on the other hand traveled westward then eastward, the aliens would have been in a position to observe the vehicle. Border Patrol Officer Gray ruled this out as a possibility. This internal inconsistency militates against the use of the vehicle's direction of travel as a factor in establishing a founded suspicion. As the Appellate Court and officers stated, the vehicle

could have traveled on normal activity to Sells, Arizona, and back within the officers' time frame.

The stop in question was without a founded suspicion for other reasons. First of all, the officers had no specific information or reason to believe the vehicle stopped was occupied by aliens. Secondly, the vehicle itself aroused no suspicion illegal activity was afoot. Thirdly, the officers were without specific information or even generalized information illegal alien activity was afoot along Highway 86 at Three Points, Arizona. The agents were also without any information, general or specific, alien activity had been reported or was suspected along the chevron trail or between Milepost 119 and 122. Even if there was reason to believe illegal activity was afoot on that particular day, the officers had no reason to believe the offense was connected with the vehicle stopped.

An analysis of the applicable legal standards, clearly and convincingly, supports the reversal ordered by the Ninth Circuit. As a general matter, Terry v. Ohio, supra, established law enforcement officers may stop or detain a person for investigative questioning if they can point to specific facts that reasonably indicate criminal activity. In both Terry v. Ohio and Adams v. Williams, 497 U.S. 143 (1972), the Supreme Court sustained this investigative technique where officers on the scene observed the accused in circumstances suggesting illegal activity. United States v. Brignoni-Ponce, supra, refused to extend the founded suspicion doctrine to circumstances where the officers, without any suspicion a particular vehicle was carrying aliens, stopped for questioning all vehicles in border areas.[4] The officers here sought to stop, question and search all vehicles coming within their profile. The officers' conduct goes beyond Brignoni-Ponce.

Even applying Brignoni-Ponce factors, the facts herein do not rise to this legal standard. The Brignoni-Ponce factors Border

---

[4] Brignoni-Ponce dealt with routes leading away from the border. Highway 86, in this case, is not a border access route.

Patrol officers may utilize in initiating a founded suspicion were stated as:

> "Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant . . . They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant . . . Aspects of the vehicle itself may justify suspicion . . . In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."

In the paragraphs that follow, the above factors will be reproduced seriatim. Each factor will be discussed as relevant to the facts in this case.

1. Proximity to the Border.

Highway 86 is the main access road to the Organ Pipe Cactus National Monument and to Rocky Point, Mexico. Both are camping areas. Proximity to the border has never been a talisman evaporating Fourth Amendment consideration. United States v. Martinez-Tapia, 419 F.2d 1375 (9th Cir. 1975) [Insufficient: vehicle stopped 1 1/4 miles from border because officer believed it came from known smuggling area.]; United States v. Peterson, 473 F.2d 874 (9th Cir. 1973) [Insufficient: vehicle stopped ten minutes away from port of entry because it departed area frequently used for smuggling.]

In order to determine whether proximity to the border is an appropriate factor depends upon the area involved and the officers' observation in that area. The area in this case is not a border access road. Although alien traffic may occur along the highway, the officers did not consider Highway 86 any more notorious a smuggling area than all of Southern Arizona. Officer Rayburn's testimony about the area was:

> "Q You indicated earlier that the distance--that that area inbetween those ranges, those two mountain ranges is frequently used by smugglers, is that correct, or aliens?

A Yes.

Q Or you believe it's used by aliens?

A Yes.

Q Isn't that in fact true from almost all of the border from Lukeville to Douglas?

A Yes, sir, it is." (RT 30-31)

2. Characteristics of the Area in Which the Vehicle is Encountered.

Border Patrol officers may also consider the characteristics of the area. Even if the chevron area is a sparsely populated desert area, the same can be said for the rest of Southern Arizona. The area's characteristics were unrelated to the vehicle stopped. If the stop had occurred between the suspected mileposts, a founded suspicion might have existed. Any suggestion that the characteristics of an area 27 miles east of the seizure point are an appropriate stop criteria is misplaced when the vehicle seized was never observed in the area.

3. Usual Patterns of Traffic.

According to the officers, the presence of defendants' vehicle was not unusual for the area. It was one of 20 others on the road. The record suggests traffic was normal for the time of day involved.

4. Previous Experience with Alien Traffic.

The officers testified that all types of conveyances including bicycles were used for transporting aliens. None of the officers' experience singled out the vehicle stopped as being more suspect than any other vehicle capable of carrying 8 to 20 persons.

5. Information About Recent Illegal Border Crossings in the Area.

No information was available regarding recent border activity.

6. The Driver's Behavior.

The driver promptly obeyed the signal to stop and did nothing out of the ordinary in response to the command to stop (RT 50, 94).

7. Aspects of the Vehicle.

The pickup truck equipped with a camper is not an inappropriate vehicle on an Indian reservation or Highway 86. In addition, agents did not observe anything unusual in the appearance of the truck suggesting it was heavily loaded or contained aliens. The Court of Appeals stated:

> "We pointed out that Carrizoza-Gaxiola, himself, was doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior or the specific appearance of his vehicle." (RT 6a-7a)

8. The Officers' Experience.

The officers testified about tracking aliens and looking for a vehicle traveling in both directions past their point. Their experience did not provide any basis other than conjecture for connecting defendants' vehicle with the chevron trail activity of the previous month.

The officers' actions, while in good faith, were not the product of good police work but rather a hunch. A hunch is not an appropriate basis for a founded suspicion. Beck v. Ohio, 379 U.S. 89 (1964).

CONCLUSION

To permit officers to use generalized suspicion without specific observations indicating some illegal activity is to completely ignore Fourth Amendment protections. The issue is not that founded suspicion can never be established on the basis of circumstantial evidence but that even if it can, it was not done in this case. In a roving patrol context, circumstantial evidence of a crime alone without any connection to a specific individual will not justify a governmental seizure to question and search.

This case does not present the evidence necessary to justify reliance upon a founded suspicion. The founded suspicion characteristics such as proximity to the border, usual traffic

patterns, previous experience with alien traffic, recent border crossings and the vehicles used were not present in this case. Their absence cannot justify either questioning the occupants or searching the vehicle.

If officers see people loading into a vehicle in a known or suspected smuggling area a founded suspicion could exist. It is quite another thing for the government to assert that a founded suspicion exists whenever a vehicle capable of carrying aliens is seen to traverse the highways of Southern Arizona. The government wants to change the specific articulable facts justifying an individual stop to a test of generalized suspicions for vehicles coming within or from a particular area.

The decision by the Court of Appeals has no significant effect upon law enforcement activity. It can be said, however, that the government's proposed founded suspicion test is a radical departure from previous case law and a return to the roving patrol acting without restraint. Terry v. Ohio, Adams v. Williams, and subsequent cases have clearly established police officers may briefly stop a vehicle or detain a person for investigative purposes, if they can point to specific facts that are reasonably indicative of criminal activity. In all previous cases, however, the specific facts or articulable circumstances have focused upon a specific person or vehicle. The existing test clearly distinguishes between the founded suspicion stop of a specific vehicle from the unfettered roving patrol condemned in Brignoni-Ponce.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NUMBER _____

UNITED STATES OF AMERICA,

Petitioner

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA,

Respondents.

AFFIDAVIT OF SERVICE

BERNARDO P. VELASCO, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of Respondents' Response on the United States Attorney for the District of Arizona, Tucson, Arizona, and has forwarded by mail a copy of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 3rd day of October, 1979.

1. Motion for Leave to Proceed in Forma Pauperis;

2. Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit;

3. Affidavit of Service.

TOM O'TOOLE
Federal Public Defender
District of Arizona

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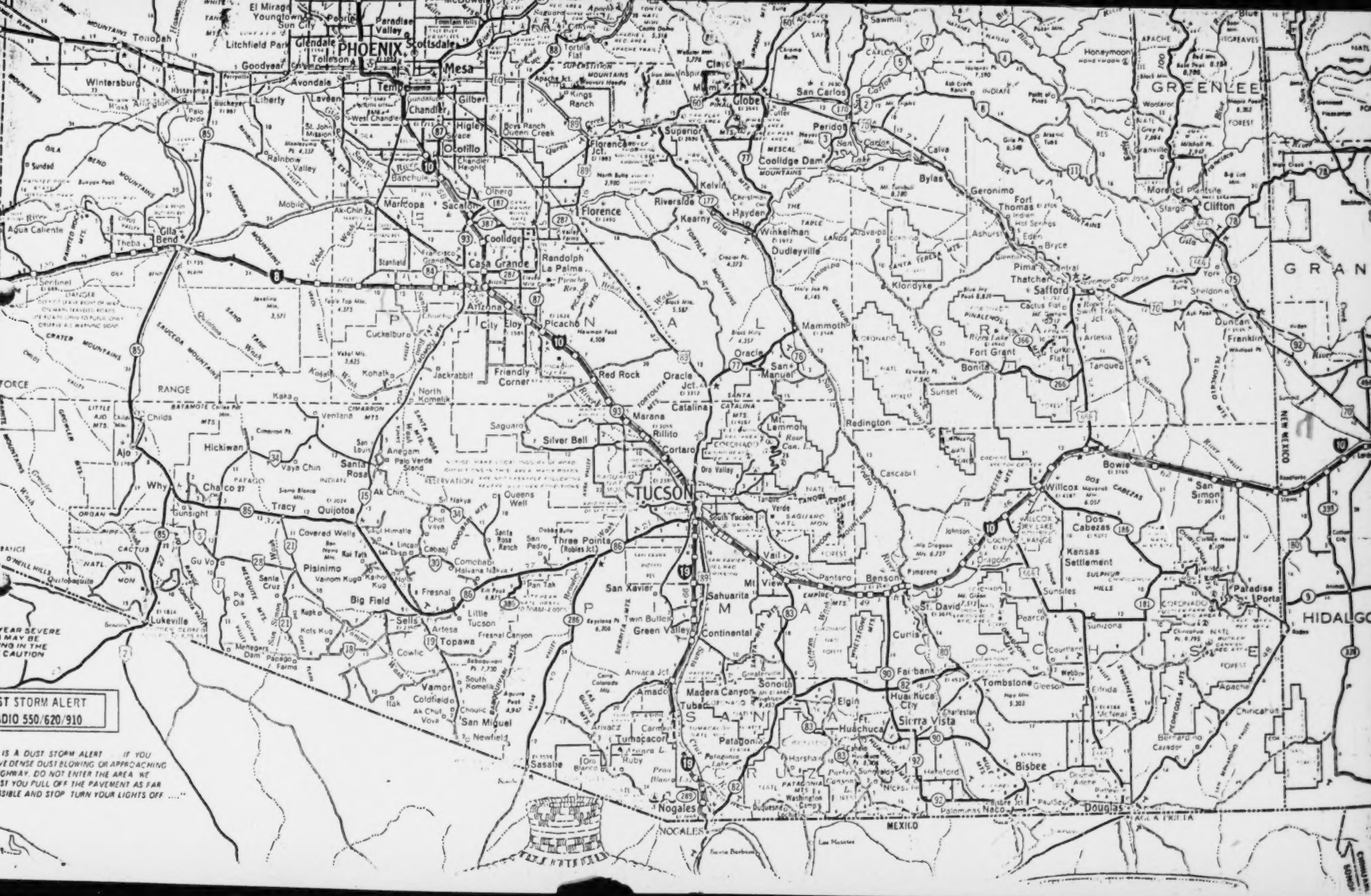
SUBSCRIBED AND SWORN to before me this 3rd day of October, 1979.

Margaret L. Jones
Notary Public

My Commission Expires:
March 3, 1980

E X H I B I T A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Wintersburg
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Rainbow Valley
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Sundad
Agua Caliente
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Gila Bend
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Vaya Chin
Santa Rosa
Anegam
Palo Verde Stand
Childs
Lukeville
Pisinimo
Big Field
Santa Cruz
Sells
Topawa
Artesa
Little Tucson
Fresnal Canyon
Cowlic
Vamori
Coldfield
San Miguel
Newfield
Sasabe
Nogales
NOGALES
MEXICO
Douglas
Agua Prieta
Casa Grande
Coolidge
Florence
Florence Jct.
Randolph
La Palma
Arizona City
Eloy
Picacho
Red Rock
Friendly Corner
Jackrabbit
North Komelik
Cuckelburo
Maricopa
Sacaton
Stanfield
Toltec
Oliberg
Mobile
Ak-Chin
Rainbow Valley
Santa Cruz
Casa Grande Ruins
Superstition Mountains
Apache Trail
Tortilla Flat
Kings Ranch
Boys Ranch
Queen Creek
Higley
Ocotillo
Superior
Globe
San Carlos
Peridot
Coolidge Dam
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Riverside
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Dudleyville
Mammoth
Oracle
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San Manuel
Catalina
Marana
Rillito
Cortaro
Ora Valley
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Silver Bell
Three Points
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Kansas Settlement
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Picacho Peak State Park
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Table Top Mts.
Sawtooth Mts.
Sand Tank Mts.
Growler Mts.
Ajo Mts.
Cabeza Prieta Game Range
Organ Pipe Cactus Nat. Mon.
Quitobaquito
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Pia Oik
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Kots Kug
Menagers Dam
Pacago Farms
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Santa Rosa Wash
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Waterman Mts.
Tortolita Mts.
Santa Catalina Mts.
Rincon Mts.
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Cañada del Oro Wash
Pinal Mts.
Superstition Mts.
Apache Jct.
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Queen Creek Wash
Santa Cruz Wash
Brawley Wash
Picacho Wash
Picacho Mts.
Picacho Reservoir
Newman Peak
Toltec Mts.
Eagle Tail Mts.
Table Mesa
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Baboquivari Peak
Kitt Peak
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Whetstone Mts.
Huachuca Mts.
Mule Mts.
Dragoon Mts.
Chiricahua Mts.
Pedregosa Mts.
Peloncillo Mts.
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Dos Cabezas Mts.
Chiricahua Nat. Mon.
Bernardino
Cavador
Paradise
Portal
Sunizona
Courtland
Webb
Gleeson
Elfrida
Apache
Willcox Playa
Willcox Lake
Sulphur Springs Valley
Aravaipa
Klondyke
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GREENLEE
GRAHAM
HIDALGO
NEW MEXICO
ST STORM ALERT
ADIO 550/620/910
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Supreme Court, U.S.
FILED
AUG 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-404

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-404

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether a founded suspicion of criminal activity can be based on circumstantial evidence suggesting that a particular person or vehicle is involved in criminal activity or must be based on direct observation of inherently suspicious activity.

I

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 595 F.2d 505.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A petition for rehearing was denied on July 19, 1979 (Pet. App. 17a–18a). On August 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 10, 1979. The petition was filed on that date and was granted on June 9, 1980 (J.A. 130). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated* * *.

STATEMENT

Following jury trials in the United States District Court for the District of Arizona, respondents were convicted of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). Each respondent was sentenced to concurrent terms of five years imprisonment on each of six counts. In addition, respondent Hernandez-Loera was fined $12,000 (J.A. 9–10).

1. The evidence at a pretrial suppression hearing showed that in early December 1976, Border Patrol officers patrolling a sparsely populated area of the Mexican border near Sells, Arizona,[1] began investigating footprints indicating that on a number of occasions groups of from eight to 20 persons had walked north from the border across 30 miles of desert and mountains to an isolated area on Highway 86, an east-west highway in Arizona (J.A. 19–30, 50–60, 101–102).[2] The officers found that the footprints followed a fairly well-defined path and that the groups travelled without resting (J.A. 23–24, 34, 57). They noticed in particular that one recurring shoeprint was of a distinctive "chevron" design (J.A. 19–21, 50–51), and that it appeared to be the lead track (J.A. 23). The officers knew that the area through which the groups passed was heavily used by aliens illegally entering the country (J.A. 28), and they concluded that a person (whom they referred to as "Chevron" (J.A. 53)) was guiding groups of aliens across the border and north to a place on Highway 86 (between mileposts 119 and 122) where they would be picked up by a vehicle (J.A. 58–59). In fact, a group of illegal aliens that had pre-

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[1] One of the officers testified that there were about five villages in the San Miguel Highway area, in which there lived a total of fewer than 100 people. J.A. 34, 49 (the San Miguel Highway is a road branching off Highway 86 at Sells, Arizona, leading south to the Mexican border (J.A. 17, 29)). See also J.A. 28, 33.

[2] In his dissent (Pet. App. 12a), Judge Chambers took judicial notice of the fact that Highway 86 "is a much smaller and less traveled road [than Interstate 10]."

viously been apprehended had identified respondent Hernandez-Loera as their guide (J.A. 21, 35, 45).

Analysis of the footprints and the times of their recurrence led the officers to a number of additional conclusions. First, they decided that the groups travelled at night, because the prints led into or over obstacles that would have been avoided in daylight (J.A. 22, 54). The officers knew that border crossings of this type are preferably made in good weather, when visibility is not impaired. They also knew that Chevron preferred to travel on or near weekends (J.A. 60). In addition, the tracks around Highway 86 indicated that the aliens, when they reached the highway, would walk parallel to it for a few miles in an eastward direction; typically, the tracks proceeded eastward at a distance of some 50 to 75 yards from the highway and then turned directly north to the highway and disappeared (J.A. 25, 40–41). From this the officers concluded that the group had been picked up by a vehicle that probably approached them from the east, because it was unlikely that the aliens, after a long overland march, would walk away from the vehicle that was coming to meet them and be facing a direction from which they could not easily identify the oncoming pick-up vehicle. The officers also concluded that, after meeting the groups, the pick-up vehicle probably returned to the east, because it was unlikely that the aliens would be walking away from their ultimate destination (J.A. 59, 84).

On the evening of January 30, 1977, Border Patrol Officers Wayne Gray and Ronald Evans stationed themselves just off Highway 86, at a point (milepost

149) approximately 30 miles east of the area where the Chevron-led groups had been picked up,[3] to watch for a vehicle that might be used in the operation (Officer Gray previously had been involved in the investigation of the chevron tracks). The officers selected that night as a likely time for Chevron to lead another group to the highway because it was Sunday and the first clear night after a three-day period of rain (J.A. 60, 64, 103, 114).[4] According to their previous tracking of Chevron, the officers assumed that if he did lead a group that night, he would not begin until after 6:00 p.m., when it got dark. Based on their experience the officers estimated that Chevron's groups covered between two and a half and three miles an hour travelling on foot (J.A. 24); accordingly, they calculated that it would take the group between eight and 12 hours to reach their pick-up point on Highway 86—*i.e.*, that they would be picked up between 2:00 and 6:00 a.m. on January 31 (J.A. 25, 62–63).

The officers were watching particularly for a camper, van or similar vehicle that would be capable of

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[3] Although at one point in his testimony (A.60–63), Officer Gray stated that he and Officer Evans had stationed themselves at milepost 114, that testimony must have been either a mistake or mistranscribed, since the officers' uncontradicted testimony was that the tracks proceeded *eastward* from milepost 119 to milepost 122, and that the officers stationed themselves approximately 30 miles *east* of there (J.A. 25, 40, 59, 60, 90). Moreover, Officer Gray subsequently testified, and Officer Evans consistently testified, that they had been stationed at milepost 149 (J.A. 64, 88, 103).

[4] Tracks that had included the chevron print had been found and followed on two previous occasions that month, on January 4 and on January 16 (J.A. 52–59).

concealing a fairly large group and that would pass them in a westward direction and return eastward approximately one and a half hours later. In their experience,[5] those were the types of vehicles most commonly used for smuggling sizeable groups of aliens, and they calculated that it would take the pick-up vehicle an hour and a half after it passed them to drive to the estimated pick-up point and return (J.A. 63–64).

During the early morning hours of January 31, the officers saw 15 to 20 vehicles pass them in a westward direction; only two of them—both pick-up trucks with camper shells—were of the kind that the agents considered likely to be useful for transporting a group of people (J.A. 64–65).[6] The first camper passed them at 4:30 a.m. (J.A. 65, 103).[7] At 6:12 a.m. this vehicle passed them again in an eastward direction (J.A. 67). The officers followed the camper and confirmed from its license plate that it was the vehicle that had passed them going west at 4:30 a.m. (J.A. 68). They then turned on their emergency lights and pulled it over *(ibid.)*. When the camper pulled over, and before Officers Gray and Evans had stopped and gotten out of

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[5]The two officers involved had substantial border patrol experience. Each had been a Border Patrol officer working in the area for two and a half to three years, and both had substantial previous law enforcement experience (J.A. 50, 102). In addition, another officer who had participated in the investigation of the chevron tracks had been a Border Patrol officer for eight years and had considerable experience in tracking (J.A. 14, 29).

[6]During the same period, the officers estimated that six to 10 vehicles passed them travelling in an eastward direction (J.A. 67).

[7]The second passed them 15 to 20 minutes later and did not, as far as the record shows, return (J.A. 66, 103).

their vehicle, respondent Cortez, who had been driving the camper, alighted from it and hurriedly approached the officers. As he did so, one of the officers noticed the left corner of the curtain on the rear window of the camper being picked up and then quickly released "like someone was looking out" (J.A. 68–69). Officer Evans remained by the patrol car, while Officer Gray met Cortez near the rear of the camper. Officer Gray identified himself and Officer Evans and told Cortez they were conducting an immigration check. Officer Gray asked Cortez if there was anybody in the camper. Cortez responded that he had picked up some hitchhikers, and he proceeded to open the back of the camper, without having been asked to do so by either of the officers (J.A. 69–70).[8] After Officer Gray determined that the six persons in the back of the camper were aliens, he placed Cortez under arrest (J.A. 70–71). Officer Evans then approached the passenger side of the camper, where respondent Hernandez-Loera was sitting. Hernandez-Loera admitted that he was a Mexican citizen. Officer Evans asked him to step out of the camper, and he was also placed under arrest. His shoes bore the distinctive chevron design on their soles (J.A. 71, 105–106).

2. The district court denied respondents' motion to suppress (J.A. 127). The court of appeals reversed, holding that the officers lacked reasonable suspicion justifying the stop of the camper (Pet. App. 1a–8a).[9]

[8] Nor had any weapons been drawn on Cortez or any search made of him prior to his voluntarily opening the back of the camper (J.A. 70, 104–105).

[9] Respondents' only Fourth Amendment claim on appeal was that the officers lacked reasonable suspicion justifying the initial

The court explained its reasons as follows (*id.* at 6a–8a; emphasis in original):

> The founded suspicion test plainly requires balancing of the facts of the particular case, see [*United States* v.] *Brignoni-Ponce*, 422 U.S. at 884–885, and in such circumstances we will not find absolutely controlling precedent since the facts will differ. A case from our court which is quite closely related is *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).
>
> In that case, officers routinely stopped southbound vehicles in a "profile" class of automobile models thought likely to be stolen and transported from Phoenix or Tucson into Mexico. The "*profile*" was, we may say, constructed from specific, articulable facts. Nevertheless, we said: "Founded suspicion requires some reasonable ground *for singling out the person stopped* as one who was involved . . . in criminal activity" (emphasis added) (523 F.2d at 241). We pointed out that Carrizoza-Gaxiola, himself, was doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle.
>
> The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped.* * *

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stop. They did not contend that the subsequent discovery of the aliens and arrest of respondents was unlawful even if the stop had been proper. Such a contention would be insubstantial in any event in view of the fact that respondent Cortez voluntarily opened the door of the camper, claiming that the occupants were hitchhikers (J.A. 70).

> The officers did not have a valid basis for singling out the Cortez vehicle. They saw no one in the camper. They saw nothing suspicious about the vehicle itself. They had no specific information about illegal movement of aliens in the area that night. They observed no mechanical or equipment defects in connection with the vehicle. They observed no violation of the traffic laws as in *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977). The sole suspicious fact connected with this specific vehicle was that it passed the officers' post headed west and returned headed east, both times in the pre-dawn hours. The passage of nearly two hours' time and the fact that the vehicle could have traveled to a small town and returned within that time, both furnish far too many innocent inferences to make the officers' suspicions reasonably warranted.

Judge Chambers dissented (Pet. App. 8a–16a). After fully reviewing the facts, he concluded (*id.* at 15a–16a):

> *United States* v. *Brignoni-Ponce*, *supra*, recognizes the validity of permitting an officer "to assess the facts in light of his experience in detecting illegal entry and smuggling". In this case the officers, on the basis of their experience, put together a series of clues and concluded that there was a strong possibility that Chevron would bring a group of aliens across the border on this night and hour and place, and that he would be met by a vehicle of this sort, traveling in this direction. The clues, as they analyzed them, were absolutely correct in each detail. I fail to see that suspicion, based on this sort of skillful police analysis, can be called "unfounded" within the test of *Brignoni-Ponce*. I therefore dissent.

SUMMARY OF ARGUMENT

This case presents the issue whether border patrol officers may make an investigative stop of a vehicle that they suspect—on the basis of inferences and deductions from a myriad of clues left at the site of previous illegal border crossings led by one of the suspects—contains aliens illegally in this country and their guide.

The Court has recognized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and elsewhere that police officers may briefly stop a vehicle or detain a person for investigative purposes if they have a founded suspicion of criminal activity, even though the information known to them may not amount to probable cause. In the present case, the clues left at the site of previous illegal border crossings led by respondent Hernandez-Loera and the inferences and deductions arising therefrom, combined with the border patrol officers' observation of respondents' round trip on Highway 86 between 4:30 and 6:00 in the morning, furnished the officers with a substantially founded suspicion (indeed, in our view, with probable cause to believe) that respondents were transporting aliens illegally in this country. In light of the relatively minimal intrusion occasioned by the officers' stop of respondents' camper and the substantial public interest in preventing the illegal entry of aliens into this country, the stop of the camper was, under all of the circumstances, amply justified.

As *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and other decisions by this Court have made clear, whether or not founded suspicion exists depends on the *totality* of the relevant circumstances. The standard for founded suspicion suggested by the court of appeals, which would require the direct observation at the time of the stop of evidence suggesting criminal activity, conflicts with those decisions. Moreover, the court's analysis would render the concept of founded suspicion unworkable, because almost any observed characteristic of a vehicle or a person, which may seem either entirely innocent or highly suspicious in itself, may actually be quite the opposite in light of all of the circumstances known to an officer. The fact that the officers in the present case relied largely on clues left at the site of previous border crossings led by respondent Hernandez-Loera, rather than on their direct observation of criminal activity, thus does not preclude the conclusion that their suspicion that respondents' camper was carrying aliens illegally in the country was a well-founded and reasonable one justifying a stop of the vehicle. Indeed, the type of discriminating investigative work engaged in by the officers in this case (which did not involve the use of a "profile") diminishes the number of police intrusions based on unarticulated hunches or random guesswork.

ARGUMENT

RESPONDENTS' FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN BORDER PATROL OFFICERS STOPPED THE CAMPER IN WHICH THEY WERE RIDING

A. The Officers Had A Founded Suspicion That Respondent Cortez's Camper Contained Aliens Illegally In This Country

1. *The Officers Possessed "Specific and Articulable" Facts in Support of Their Stop of Respondent Cortez's Camper*

"Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. 160, 175–176 (1949), quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925). We submit that the plethora of facts recited above gave Officers Evans and Gray probable cause to believe that respondents were smuggling aliens in Cortez's camper at the time and place where they were stopped.[10]

That issue does not, however, have to be reached in the present case to justify reversal of the judgment of

[10] While those with more fertile imaginations than we possess can perhaps conjure up a possible innocent explanation for the camper's early morning round trip down a relatively uninhabited road near the border, the officers, armed with considerable information regarding illegal border crossings in the area, reached what seems to us to have been an almost inescapable conclusion that the camper's mission was probably alien smuggling.

the court of appeals. Beginning with *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has established that police officers may briefly stop a vehicle or detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity, even though the facts do not amount to probable cause—*i.e.*, a stop may be based on facts that support a reasonable suspicion, albeit not a reasonable conclusion, of criminality. Because the only intrusion complained of here was the officers' brief stop of Cortez's camper for the purpose of questioning its occupants, the only issue before this Court is whether there was reasonable, or founded, suspicion justifying that minimal intrusion. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 874 (1975).

In *Terry*, *supra*, this Court " 'balanc[ed] the need to search [or seize] against the invasion which the search [or seizure] entails' " (392 U.S. at 21, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 534–535, 536–537 (1967)) and held that a protective frisk for weapons (entailing not only a seizure but a limited search of the suspect) was reasonably warranted, in the absence of probable cause, by "specific and articulable facts * * * taken together with rational inferences from those facts * * *." 392 U.S. at 21. See *United States* v. *Brignoni-Ponce*, *supra*; *Adams* v. *Williams*, 407 U.S. 143 (1972). The lawfulness of a seizure has been said to depend on "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise." *United States* v. *Mendenhall*, No. 78–1821 (May 27,

1980), slip op. 2 (Powell, J., concurring). See *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880.

In *United States* v. *Brignoni-Ponce*, *supra*, this Court enunciated the relevant principles specifically in the context of vehicle stops by Border Patrol officers for the purpose of questioning the vehicle's occupants about their citizenship and immigration status. Although the Court concluded that the single factor relied on by the agents in that case—the apparent Mexican ancestry of the occupants—did not furnish reasonable grounds justifying the intrusion, it made clear that other circumstances could furnish reasonable suspicion justifying what the Court recognized (422 U.S. at 880, 883) as a "modest" intrusion on the freedom of movement of travellers. Thus, the Court stated (422 U.S. at 884–885 (citations and footnote omitted)):

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. * * * They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. * * * Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used

> for transporting concealed aliens. * * * The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. * * * The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. * * * In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. *Terry* v. *Ohio*, 392 U.S., at 27.

Far from failing to satisfy the *Brignoni-Ponce* standard as the Ninth Circuit held, this case does not even begin to test its outer boundaries. Indeed, most of the factors suggested by the Court in *Brignoni-Ponce* are present in this case. Here, the officers took into account the characteristics of the area they were patrolling—its sparse population and proximity to the Mexican border. They were also well aware that this sparsely populated area was heavily used by aliens illegally entering the country. As *Brignoni-Ponce* suggests, the officers gave consideration to the type of vehicle that could conceal a substantial number of persons and therefore concluded that their target was a van, pick-up, camper shell, U-Haul truck or something of that nature. They also considered relevant respondents' behavior in making a round trip excursion on Route 86 between 4:30 and 6:00 in the morning—a time that not only corresponded with their inferences regarding the likely occasion for the smuggling opera-

tion, but which also rendered an innocent explanation for the trip most unlikely.[11]

Perhaps most significant in the context of this case is *Brignoni-Ponce's* admonition to "consider information about recent illegal border crossings in the area" (422 U.S. at 885). For in the present case, not only were the officers generally aware of a high degree of alien smuggling in the area, they were also aware of previous smuggling expeditions led by the very man whom they suspected, "Chevron" (respondent Hernandez-Loera), from which they were able to deduce a likely and very specific modus operandi in terms of the time of day, the time of week, the exact route that the aliens would be taking, and the particular movements of the suspected pick-up vehicle.

What transpired in the present case is thus the exact opposite of the random seizures that this Court struck down in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), and *Brown* v. *Texas*, 443 U.S. 47 (1979), or, indeed, of the inadequately justified stop in *Brignoni-Ponce* itself. In contrast to the lack of either probable cause or reasonable suspicion to justify the seizures that were made in those cases, the materialization of the expected modus operandi, in the form of Cortez's camper reappearing before the officers at milepost 149 at 6:12 a.m. on January 31, 1977, clearly provided them with "specific and articulable facts," if not with probable cause, that amply justified the limited intrusion that followed.

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[11] As Judge Chambers stated in his dissent (Pet. App. 14a): "It was possible that this camper was making a round trip to Sells; but it is hardly probable."

2. *The Intrusion Involved in the Stop Was Minimal and the Public Interest in Preventing the Illegal Entry of Aliens is Substantial*

The officers' stop of respondent Cortez's camper and questioning of respondents was no less "modest" an intrusion upon its occupants' freedom of movement than was the investigative stop that was before this Court in *United States* v. *Brignoni-Ponce, supra.* In both cases, the expressed limited purpose of the stop was to question the occupants of the vehicles about their citizenship and immigration status (422 U.S. at 874; J.A. 81), and in neither case was that purpose exceeded until either consent to do so was obtained or probable cause to do so was established. In *Brignoni-Ponce,* this Court described the stop at issue therein as involving "no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside" (422 U.S. at 880 (footnote omitted)). Similarly, in the present case, the officers' purpose in stopping respondent Cortez's camper was to question its occupants briefly about their citizenship and immigration status. No search of the camper or any of its occupants occurred until Cortez voluntarily opened the back door of the camper. Although even such a limited seizure as is at issue here is somewhat more intrusive than the mere approach to and questioning of an individual in an airport concourse that was involved in *United States* v. *Mendenhall, supra,* it is clearly less intrusive than the "careful exploration of the outer surfaces of a person's clothing all over his or her body

in an attempt to find weapons" (392 U.S. at 16) that was held in *Terry* v. *Ohio*, *supra*, to be warranted by "specific and articulable facts" short of probable cause.

Moreover, this Court previously has recognized the important public interest in maintaining effective measures to prevent the illegal entry of aliens at the Mexican border, as well as the difficulties faced by law enforcement agencies in attempting to do so. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 551–552 (1976); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878–879; *United States* v. *Ortiz*, 422 U.S. 891, 900–914 (appendix of concurring opinion of Burger, C.J.); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 276–277 (1973) (Powell, J., concurring). The enforcement of the Nation's immigration laws is important for the protection of the illegal aliens who are smuggled into this country as well as for the protection of those, both citizens and aliens, legally here. *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 879.

Terry and its progeny require a balancing, on the one hand, of the intrusiveness of the seizure or detention against, on the other hand, the strength of the public interest and the reasonableness of the suspicion possessed by the officers. We submit that when one balances the minimal invasion of freedom of movement involved in stopping a vehicle for the purpose of questioning its occupants concerning their citizenship and immigration status against the strong public interest in preventing the illegal entry of aliens into this country and the myriad of "specific and articulable" facts available to the officers here, ranging from such details as "Chevron's" footprint in the desert to the approxi-

mate time of the aliens' pick-up, one cannot but be convinced of the reasonableness—indeed of the requisiteness—of the officers' actions in stopping respondent Cortez's camper.

B. The Existence of Founded Suspicion is Not Precluded Because the "Specific and Articulable" Facts Upon Which it is Based Are Circumstantial Evidence

Notwithstanding all of the foregoing specific and articulable facts, the court of appeals' majority concluded that there was not a certain kind of additional information—namely, the officers' direct observation of some aspect of the vehicle or its occupants that in and of itself indicated criminal activity, such as, the court suggested (Pet. App. 7a), mechanical or equipment defects or a violation of the traffic laws.[12] The court's decision thus appears to stand for the legal proposition that founded suspicion can never be established on the basis of what is commonly referred to as circumstantial evidence. That proposition of law finds no support in this Court's decisions,[13] and it conflicts

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[12] The court also stated (Pet. App. 7a) that the officers "had no specific information about illegal movement of aliens in the area that night." Although we submit that such "specific information" is not a necessary ingredient for reasonable suspicion, it is difficult to see how such information would have aided the officers under the court of appeals' own view, since it would not have constituted "some additional fact or facts which focus suspicion on the individual or vehicle stopped" *(ibid.)* and would not have provided further grounds for "singling out the Cortez vehicle" *(ibid.)*.

[13] In *Adams* v. *Williams*, 407 U.S. 143 (1972), this Court rejected the notion that reasonable cause for an investigative stop

squarely with the standards that *Brignoni-Ponce* established specifically with respect to the Border Patrol. Moreover, that proposition would eviscerate and render unworkable the concept of reasonable, or founded, suspicion, which is based on the *totality* of the relevant circumstances.

The standard suggested by the court of appeals conflicts with *Brignoni-Ponce* because it would make most of the factors there identified as significant by this Court—the characteristics of the area, its proximity to the border, usual traffic patterns, previous experience with alien traffic, recent border crossings and the type of vehicle stopped—either irrelevant or superfluous. Unless there is some additional and specific aspect of the vehicle that is directly observed and that itself creates a reasonable suspicion of criminal activity, no combination of those other factors apparently can furnish reasonable suspicion satisfying the court of appeals, no matter how compellingly they indicate to a person of reasonable caution that a limited stop for further investigation is warranted. Yet *Brignoni-Ponce* clearly established that all of the factors identified by the Court are relevant; the fact that the Court stated that each of those factors "may" be considered (422 U.S. at 885) further indicates that no single one of those factors must be present in every case.

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can only be based on an officer's personal observations (*id.* at 147). As the Court stated, "[i]nformants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation" *(ibid.)*.

More generally, the decision below makes meaningless the entire concept of founded suspicion. Founded suspicion exists when the *totality* of relevant circumstances would lead a person of reasonable caution to suspect criminal activity and to conclude that a limited intrusion for the purpose of further investigation is warranted. See *United States* v. *Mendenhall, supra* (Powell, J., concurring); *United States* v. *Brignoni-Ponce, supra; Terry* v. *Ohio, supra.*[14] The relevant circumstances in the present case included the following: a particular guide had been repeatedly leading large groups of illegal aliens on foot across the Mexican border through the same 30 miles of sparsely-populated terrain to a relatively uninhabited section of an east-west highway (Route 86), along which the guide and the aliens would walk in an eastward direction to milepost 122, where they apparently were picked up, presumably by a van, camper, or similar vehicle capable of concealing a group of eight to 20 people. From these facts the officers had deduced that the pick-up vehicle came from the east, picked up the aliens, and then returned to the east, since it was unlikely that the aliens would walk in the opposite direction from their ultimate destination or in a direction from which they could not keep a lookout for the vehicle that was to meet them. Their observations further indicated that the guide traveled at night and usually on or near weekends; they were also aware

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[14] While listing the factors it considered relevant in *Brignoni-Ponce*, the Court specifically noted that "[e]ach case must turn on the totality of the particular circumstances" (422 U.S. at 885 n.10).

that illegal border crossings are usually made in good weather, when visibility is good; the night of Sunday, January 30, 1977, was the first clear night after a three-day rainy period. At 4:30 a.m. on January 31, 1977, respondent Cortez's camper, traveling westward, passed Officers Gray and Evans, who were positioned at milepost 149, approximately 30 miles east of the customary pickup point; at 6:12 the same morning, the camper again passed the officers, backtracking its way eastward.

To reduce the foregoing collection of facts, as the court of appeals did, to the statement that a specific vehicle "passed the officers' post headed west and returned headed east, both times in the pre-dawn hours" (Pet. App. 7a) is to ignore all of the clues left by "Chevron" and his groups and all of the inferences and deductions available to the officers therefrom. The court thereby ignored the totality of the circumstances in favor of a requirement of a single determinative indication of criminal activity.

Furthermore, the court then plainly erred by discounting the thus reduced statement of known facts and inferences therefrom as "furnish[ing] far too many innocent inferences to make the officers' suspicions reasonably warranted" (Pet. App. 8a). The fact that each of the individual circumstances may itself be consistent with innocent behavior does not preclude the totality of the circumstances from establishing founded suspicion. See *United States* v. *Mendenhall*, *supra*, slip op. 4 (Powell, J., concurring); *Terry* v. *Ohio*, *supra*, 392 U.S. at 22; *United States* v. *Price*, 599 F.2d 494, 502 (2d Cir. 1979). Certainly the facts that

this Court held warranted a stop and frisk in *Terry* or said could justify an automobile stop in *Brignoni-Ponce* were consistent with innocent behavior. Virtually any set of facts can be said to be consistent with innocent behavior even if a high probability of criminal activity is indicated.[15] Indeed, it is inherent in the concept of reasonable suspicion that the probability of an innocent explanation for the known facts outweighs a guilty one; if it did not, there would be probable cause. Thus, the substantial possibility of an innocent explanation is essentially immaterial to an assessment of the lawfulness of the limited intrusion entailed in an investigative stop; the pertinent inquiry is whether there is a rational and articulable basis for suspecting criminal activity.

Moreover, the standard suggested by the court of appeals is unworkable. The materiality of any single item of information necessarily depends on all of the information known to the officer, and the court of appeals' distinction between directly observed evidence suggesting criminal activity—which it believes must be present to furnish reasonable suspicion—and other circumstances suggesting criminal activity is a meaningless distinction in this context. Almost any observed characteristic of a vehicle or a person that may seem entirely innocent in itself may, on the basis of the totality of the known circumstances, be quite indicative of criminal activity to a person of reasonable cau-

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[15] Even the reasonable doubt standard does not require an instruction that the evidence be inconsistent with some conceivable hypothesis of innocent behavior. See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

tion. Conversely, almost any observed characteristic that might be quite suspicious in some, or even most, contexts might actually be indicative of innocence in light of all of the circumstances known to an officer. In short, there would ordinarily be no meaningful way by which an officer could conclude that a given set of directly observed characteristics of a vehicle or its occupants does or does not indicate criminal activity unless he considers the total context and all other circumstances known to him.

In sum, the court of appeals' decision imposes an unworkable and unsound standard on law enforcement agencies operating within its jurisdiction, a standard that would encourage officers to focus on specific kinds of observations that may not be particularly probative in the circumstances and would deter them from making rational decisions on the basis of thorough background investigations.

Finally, the court of appeals characterized the stop in this case as "solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle" (Pet. App. 7a). In so doing, the Ninth Circuit erred. First, it fundamentally misunderstood the nature of a "profile." Contrary to the distinction drawn by the court below, a profile is comprised of the very type of facts that the court of appeals complained the officers in this case lacked, that is, facts associated with an individual, his appearance and his behavior. See, *e.g.*, *United States* v. *Mendenhall*, *supra* (Powell, J., concurring), in which drug enforcement officers' approach and questioning of an individual in an airport concourse was deemed

proper on the strength, at least in part, of the following facts, all of which corresponded with characteristics of the Drug Enforcement Administration's drug courier profile: the suspect's nervousness, the fact that she was the last passenger to deplane, her scanning of the entire gate area, and the facts that she had no baggage and changed from an American Airlines to an Eastern Airlines flight (slip op. 5–6). Thus, contrary to its expressed intention, what the Ninth Circuit in fact appears to have condemned in the instant case was the absence of observation of facts that would coincide with some predetermined profile.

In reality, no profile, as that term is commonly used, was employed in this case.[16] A profile is a set of typical characteristics of a particular type of criminal, such as an airplane hijacker or a drug courier, developed by law enforcement agents on the basis of their pooled experience; it may be used as part of the basis for stopping a person matching the profile, quite apart from the agents' possession of specific information that the person is engaged in criminal activity. The information relied on by the officers in this case thus was not a profile,[17] because it was developed as a result of weeks of careful investigation of the specific, indi-

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[16] For example, the Court is not being asked herein to validate every stop of a camper making an early morning one and one-half hour round trip on a lightly-travelled road in a sparsely-populated area near the Mexican border.

[17] The main factor that could arguably be characterized as "profile" information is the focus on use of a large vehicle, such as a camper, since Border Patrol agents are aware of the frequent use of such vehicles for alien smuggling. Even that is not truly a "profile" use here, since the agents' investigation of Chevron's specific activities had revealed that large groups

vidualized pattern of criminal activity that was ultimately detected.[18]

The operational features of the smuggling scheme that led to respondents' apprehension were in the main discerned not from the agents' prior general experience with alien smuggling, but from clues left at the scene of respondent Hernandez-Loera's prior border crossings that indicated the time, place and method thereof.[19] To find clues and deduce from them identifying features of the culprit is the essence of good detective work. Contrary to the suggestion of the Ninth Circuit (Pet. App. 3a), this type of investigative work diminishes the number of police intrusions based on unarticulated hunches or random guesswork. Compare *Delaware* v. *Prouse*, *supra*. In our view, such law enforcement efforts should be applauded, not disparaged or discouraged, by the courts.

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were involved, thus necessitating the use of a vehicle with substantial capacity.

[18] Although we are not relying on such a profile in the present case, we do maintain that a correlation of observed facts with a discriminating profile should not be disregarded, but is in fact a significant and legitimate consideration in determining the permissibility of a stop. We have never suggested, however, that a profile in itself automatically constitutes a standard of either probable cause or reasonable suspicion. The reasonableness of a stop must always be measured by the totality of the circumstances. See *Reid* v. *Georgia*, No. 79-488 (June 30, 1980) (per curiam); *United States* v. *Mendenhall*, *supra*, slip op. 6 n.6 (Powell, J., concurring).

[19] One aspect of the officers' description of respondents' smuggling scheme that appears to have been based on alien smuggling operations in general was the type of weather conditions under which the officers expected alien smuggling to be carried out. The officers' consideration of this factor surely could not be improper simply because of its general validity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MICHAEL RODAK, JR., C:

No. 79-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Petitioner,

v.

JESUS E. CORTEZ AND HERNANDEZ-LOERA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR JESUS E. CORTEZ, RESPONDENT

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QUESTION PRESENTED

Is the requirement, that a founded suspicion is necessary before a vehicle on the open highway may be stopped and searched, satisfied if the Agents have a hunch that there will be illegal activity.

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CONSTITUTION:

United States Constitution, Fourth Amendment 13

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---

BRIEF FOR JESUS E. CORTEZ, RESPONDENT

STATEMENT

Jesus E. Cortez raised two issues in his appeal to the Ninth Circuit Court of Appeals. The first is the issue herein, and the second concerned a jury instruction.

The Court of Appeals felt it was not necessary to reach the jury instruction issue because of its ruling on the issue of the stop.

FACTS

A) The Site

All of the matters related to in this case took place in the southern central portion of the State of Arizona

within approximately fifty miles of the Arizona-Mexico border. This area consists of some towns, a number of Indian villages, and Sells, Arizona, which is the headquarters of the Papago Indian Reservation. Exhibit A, which is a map and which is attached to the Response to the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit, shows this entire area. Tucson, Arizona is a short distance east of this area, and Phoenix, Arizona, is to the north. According to the testimony of the Agents in this case, the entire four hundred miles of the Arizona-Mexico border area is used for illegal alien traffic.

There are two highways in this area that are referred to in this case, and they are: Highway 86, which is an east-west road going from Tucson, Arizona westernly for approximately 100 miles to the town of Why; and Highway 286, which is a north-south road and goes from the town of Three Points south for forty-six miles to the town of Sasabe which is on the Arizona-Mexico border. Highway 286 intersects with Highway 86. Midway along Highway 86 one can turn north on Highway 15 and this road leads to Phoenix, Arizona. Between Three Points and Sells, on a side road that connects with and which is just off Highway 86 is the world reknown Kitt Peak National Observatory.

B) Prior Investigations

On December 4, 1976, Agent James Rayburn, a Border Patrol Agent, was assisting other Border Patrol Agents process a group of illegal aliens at Casa Grande,

Arizona. While he was doing this, the Agents showed him a footprint in a Chevron design, and told him that this was the person who another group of aliens had identified as being the man who guided them (J.A. 21). There was no information as to when this had happened (J.A. 37).

Wayne Gray, another United States Border Patrol Agent, stated that he first saw the Chevron track on Tuesday, January 4th, 1977. He encountered it at milepost 119 and followed the track until milepost 122 where it ended (J.A. 51). He also saw an older set of tracks which he estimated were a week old (J.A. 55). He thought the newer set of tracks to be a day or two old (J.A. 55).

On Sunday, January 16, 1977, Agents Rayburn and Gray were again in this area and followed tracks through the desert for some miles until they came to milepost 119. From there the tracks ran parallel until they came out on the road at milepost 122. While they were following these tracks they saw another set of tracks that Officer Rayburn guessed were three or four days old. However, he went on to say it was difficult to tell how old the older tracks were as there had been a rain between the time the tracks were made and when they were observed by him (J.A. 24). On cross-examination he said he really could not tell how old this track was (J.A. 47). Agent Gray estimates these same tracks to be five days to a week old (J.A. 58). The older tracks were approximately 150 feet apart from the newer tracks. The newer tracks were one day old.

From the tracks that Agent Gray saw on the 16th, he assumed that the aliens would be walking in an easterly direction after they arrived on the highway, and that the vehicle that picked them up would be traveling in the same direction (J.A. 59). He went on to say that as to both the old and new sets of tracks he saw on January 16th he could not say where the vehicle that picked the aliens up had come from or was going to after the pickup (J.A. 92).

C) The Prior Tracks—When They Were Made

Agent Gray said that on Tuesday, January 4th, he saw two sets of tracks and one was a day-old and the other was *approximately* a week old. (The Government's footnote 4 in its Brief is erroneous when it states that a track was found on January 4th. Agent Gray testified that the track had been discovered on January 3rd by a border pilot named Akin who reported the track (J.A. 52)).

Agent Rayburn said that on Sunday, January 16th he saw two sets of tracks. One set was a day old. The other set *could have* been three or four days old, which would be a Wednesday or Thursday, but he really did not know how old since there had been a rain in the area after the tracks had been made.

Based on the above, the Agents testified (J.A. 60), and the Government argues, there is a showing of a weekend pattern of alien traffic. A critical perusal of their testimony shows that alien traffic, based on the

tracks they personally saw, could have been made as easily on one day of the week as almost any other.

D) Time When Aliens Would Travel

The Agents stated that they *assumed,* and the Government argues, that the aliens would arrive at milepost 122 between 2:00 and 6:00 a.m. on January 31st. This was predicated upon their *assumption* that the aliens would start traveling around 6:00 o'clock the previous evening. Agent Gray, who knew of occasions where groups of aliens crossed the border during the daylight hours (J.A. 86), admitted that if the aliens started traveling at 3:00 or 4:00 o'clock in the afternoon they would have arrived before any of the Agents were set up for observation (J.A. 85).

Furthermore, the Agents testified that they had no knowledge of any observation of aliens on the route on January 30th (J.A. 85). In fact, the last time any Agent had gone to the vicinity of milepost 122 was on January 16th, 1977. The Agents just assumed that the aliens would travel between 2:00 and 6:00 a.m. and arrive at milepost 122. Not even the captured aliens led by Chevron reported that they arrived at milepost 122 between 2:00—6:00 a.m.

E) Direction of Pickup Vehicle on Earlier Occasions

Agent Wayne Gray testified that the tracks he followed on January 16th led to the *inference* that the aliens were walking in an eastward direction after

reaching the highway and *apparently* the vehicle would be going in the same direction. However, on cross-examination, he said he could not tell in which direction the vehicle was heading when it picked up the aliens who left the tracks he saw on January 4th and 16th (J.A. 92). He said the vehicle could have come from Casa Grande and picked up the aliens and returned to Sells (J.A. 92). He had no information that the pickup vehicle was coming from Tuscon (J.A. 92).

Notwithstanding this testimony, the Government in its Statement of Facts in its Brief states that the Officers *concluded* that the previous group of aliens had been picked up by a vehicle that *probably* approached them from the east and returned to the east. The Government cites J.A. 59 and 84 as supporting this assertion, but a close reading of those pages shows that the Government has misread them. The Agents did not so testify. In fact, Agent Gray testified they watched vehicles going in both directions (J.A. 64). This obviously belies the conclusion of the Government.

F) Type of Vehicle—Profile

Agent Wayne Gray testified that he was looking for a vehicle that would hold eight to twenty people. This could be a van, pickup, camper shell, U-Haul, motor home, trailer or any vehicle of this nature (J.A. 63), but for some reason this did not include commercial linen trucks (J.A. 64) or sedans (J.A. 79). He stated that he had a vehicle profile (J.A. 78) and he was going to

search every vehicle within the profile that traveled west and returned east between 2:00 and 6:00 a.m. (J.A. 78).

The Government now claims for the first time that there was no vehicle profile in this case. This claim is made even in view of the fact of the Agents' testimony referenced to above and to the fact that the Government in its Brief in the United States Court of Appeals for the Ninth Circuit (at page 12), stated that the vehicle which the Agents observed at 4:30 a.m. fit their profile.

G) January 31, 1977

The Agents testified that they *assumed* the aliens would travel at night and would not travel in inclement weather. They stated that on the previous three days it had been either rainy or inclement. On January 31st there was moonlight and the Agents set themselves up at an elevated position at milepost 149, near Three Points, Arizona, in order to be able to watch Highways 86 and 286 (J.A. 61,89), from one location (J.A. 114). They watched both highways because they had no idea of the vehicle's route. On earlier occasions (January 4th and 16th) when they had seen the Chevron tracks they did not know in which direction the vehicle that picked the aliens up was heading (J.A. 92).

Agent Gray testified that they had a vehicle profile that included any vehicle capable of holding eight to twenty aliens and that would not draw attention (J.A. 63, 78, 79). This included vans, pickups, camper shells, U-hauls, motor homes, trailers or some type of vehicle of this nature, but did not include linen trucks (J.A. 63,

64) or sedans (J.A. 79). The Agents *estimated* that it would take a vehicle approximately one hour and a half to go from their location at milepost 149 to the vicinity of milepost 122, pick up aliens, and return to milepost 149. They intended to stop and search any vehicle in the above category that made this return trip in about an hour and a half between 2:00 a.m. and 6:00 a.m. (J.A. 78). Interestingly, they did not intend to stop sedans even though they knew that aliens had been put in sedans (J.A. 79). They also did not stop linen trucks that went by them, and in fact, they didn't even bother to determine whether the linen trucks ever came back (J.A. 90). The Agents had no knowledge, but *assumed*, that aliens had crossed the border in the early evening of January 30, 1977. They also had no knowledge as to what type of vehicle was to be used to pick up the aliens (J.A. 92). There was no observation by any Agent of the suspected route on this day (J.A. 85) and the records do not indicate any observation since January 16th.

At approximately 4:30 a.m. one Agent saw a pickup with a camper shell pass going westward. Agent Gray, who had gotten very close to the highway so that he would be able to try and see the license plate and got a partial reading of the plate — GN 88, but he was unable to give a description of the vehicle insofar as its color was concerned because of the darkness. The only light he had was moonlight (J.A. 66). However, Agent Evans, who was further away according to Agent Gray, but who said he was closer, testified that the vehicle was greenish-yellowish (J.A. 103). When they finally pulled

the vehicle over, Agent Evans got out with a shotgun in his hands (J.A. 104). Agent Gray said that after he pulled over Defendant's vehicle the driver got out and went to the rear of the vehicle. At the same time Agent Gray saw someone look out of the rear window (J.A. 68). He then stated he asked the Defendant Cortez a few questions and then Cortez, without being asked, opened the rear of the camper (J.A. 70).

The testimony of Jesus Cortez was that he had come to this location by starting in Phoenix where he had taken Interstate 10 to Casa Grande and then came down Highway 15 until it intersected with 86 and then proceeded in an easterly direction on Highway 86. He thought his license number was CN 8804. He further testified that when he was stopped he was told to open the camper which he did (J.A. 122). As a result of this, the evidence sought to be suppressed was discovered.

SUMMARY OF ARGUMENT

A founded suspicion is now and ought to continue to be required before a vehicle may be stopped and searched. The Government would like to be able to have a stop and search of an automobile based on a good hunch. For their purposes it doesn't matter if a good hunch is a new category or if this Court expands the existant category of founded suspicion so as to include hunches.

The Government obviously does not like the test of *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 45 L.Ed 2d 607 at 617, 95 S. Ct. 2574, which requires specific ar-

ticulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains illegal aliens. It would rather see the Court modify the test so that vehicles may be stopped and searched for illegal aliens if they are found fairly near the border at night, and the agents don't recognize the vehicle as being from the local area. (It may be being too charitable to include — at night). The Government does not want to be tied down to articulable facts — they want to be able to use hunches, and a hunch by any other name is still a hunch. In view of the fact that the Government did not have probable cause nor a founded suspicion for the stop and intended search of the Cortez vehicle, the stop was illegal.

ARGUMENT

RESPONDENTS' FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN BORDER PATROL OFFICERS STOPPED THE CAMPER IN WHICH THEY WERE RIDING

A) Minimal Intrusion

Automobile traffic is a basic and necessary mode of travel. *Delaware* v. *Prouse,* 440 W. 648 at 662, 59 L. Ed. 660 at 673, 99 S. Ct. 1391. This is particularly so in the southwest desert area.

Wayne Gray, a United States Border Patrol Agent, testified on cross-examination, that it was his intent to stop and search every single vehicle that met his vehicle profile between the hours of 2:00 and 6:00 a.m. that

passed him going west, and then returned in an easterly direction (J.A. 78). Notwithstanding this testimony, the Government argues that the stopping of the Respondent's vehicle contemplated minimal intrusion, and now asserts for the first time that the express limited purpose of the stop was to question the occupants of the vehicles about their citizenship and immigration status.

The stopping of a vehicle on the open highway, and a subsequent search, amounts to a major interference in the lives of the occupants. *Colidge* v. *New Hampshire*, 403 U.S. 443, at 449, 29 L. Ed 2d 564, 590, 91 S. Ct. 2022. In *United States* v. *Brignoni-Ponce, supra,* this Court said that a vehicle may be subjected to the minimal intrusion of a brief stop in order for an officer to ask questions, but not for the purpose of searching the vehicle.

In footnote No. 6 of *Brignoni-Ponce, supra,* the Government informed this Court that its roving patrols now search vehicles only when they have probable cause to believe that they will find illegal aliens or contraband. Obviously that policy did not last very long.

B) Probable Cause

Speaking of probable cause, now comes the Justice Department and asserts that probable cause existed to believe that Respondents were smuggling aliens at the time and place when they were stopped (Government's Brief, p. 11).

The Government has never previously argued probable cause for the stop as can be seen from the following:

(1) In the Government's Opposition to the Respondent's Motion to Suppress in the Trial Court, the Government did not then argue that there was probable cause for the initial stop. Instead, the Government stated probable cause existed after the stop was made and the Agents had asked questions;

(2) The Government in its Answering Brief in the Ninth Circuit, again did not argue that there was probable cause to stop the vehicle; and

(3) In its Petition for Rehearing with Suggestion for Rehearing En Banc, in the Ninth Circuit, it again argued founded suspicion and not probable cause for the stop.

However, if the Government now wishes to argue that there was probable cause for the stop they should be allowed to do so, provided they are held responsible for all the ramifications and consequences of this position. If probable cause existed to stop the vehicle, it existed and was based on information which had been fully gathered by January 16, 1977. No new information was acquired from that date until the time of the stop. Having two weeks time, the Government should have attempted to obtain advance judicial approval for their decision to conduct searches on Highways 86 and 286 on the early morning of January 31st between the hours of 2:00 and 6:00 a.m. This seems to be the situation Justice Powell was referring to in his concurring brief in

Almeida-Sanchez v. *United States,* 413 U.S. 266, 37 L.Ed 2d 596, 93 S.Ct. 2535 (P. 608 and footnote 4 at 609). See also *United States* v. *Brignoni-Ponce,* footnote 7, P. 617.

Since the Government had, as it now claims, probable cause for the stop, then the decision of the Ninth Circuit should be affirmed because the Government had ample time to seek a search warrant. Having failed to do so, and failing to show that it was impractical to do so, the stopping and intended search of the vehicle was in violation of Respondent's Fourth Amendment Rights. *Terry* v. *Ohio,* 392 U.S. 1, 20 L. Ed 889, at 905, 88 S. Ct. 1868.

Surely, two weeks is a reasonable time to go to the United States Magistrates in Tucson (which is only forty-five miles from Sells) and attempt to obtain this type of warrant. There would have been a number of options open to the Magistrate: (1) find no probable cause based on the facts and refuse to sign the warrant; (2) find probable cause but refuse to issue search warrant because he felt that he could not issue an area warrant; or (3) find probable cause and issue an area warrant but limited in its area, time and scope. The Magistrate would necessarily have to limit (a) the type of vehicle to be stopped; (b) the section of the highway to be included in the area; (c) the hours, and (d) the days. The Magistrate would also have to decide if in addition to a stop whether a search could be made of the vehicle and, if so, its scope.

This Respondent submits that the Magistrate would have refused to issue the warrant for the primary reason

that, based on the facts known to exist to the Agents, they did not have probable cause to stop Respondent's vehicle. The facts known are just as lacking in probable cause as those in *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 20 L.Ed 2d 538, 88 S. Ct 1472, where a car was seen driving by the home of Lloyd Ducket. Shots were fired from the car into the home. People standing in the front yard fired back at the car with a pistol, and thought that they hit the back of the car. One of them informed the Sheriff and shortly thereafter a Deputy Sheriff received this information on his radio, and he spotted a suspicious car and followed it. The car raced away but was stopped by a policeman in a nearby city. In the vehicle was found an air rifle. The court found that the search of the vehicle violated Petitioner's Fourth Amendment right. The court said that on the record before them neither the Sheriff nor any of the officers who assisted in the search had reasonable or probable cause as to believe that evidence would be found in the car. The only thing the officer knew was that he chased an old-make model car, that it had speeded up when he chased it, and that it contained a fresh bullet hole. The court found this insufficient to justify a conclusion that the car was searched with reasonable or probable cause to believe that the search would be fruitful.

The description of an 'old-make model car' is narrower than the vehicle in our profile as both new and old make model cars are in our profile.

In the instant case, the Agents simply did not have enough information to obtain a warrant. A close look at

the evidence shows that the following facts existed at 6:12 a.m., on January 31, 1977, and were known to the Agents:

1) Aliens are smuggled across the Arizona-Mexico border;

2) Agents were in an area that was within fifty miles of the border;

3) The Agents had been told by other Agents, that a man who guided aliens from Mexico had a Chevron print in his shoe tracks, and that on a case the other Agents had previously handled (at an unspecified time) the aliens had identified that man as having been the man that guided them off Highway 86 (J.A. 21);

4) On January 4th and 16th, Agents saw both a fresh and an old set of tracks. In each set of tracks there was a Chevron design;

5) It had rained, or the weather had been inclement on the three previous days to January 31st.

6) The Agents saw a pickup vehicle go by them at approximately 4:30 a.m. in a westernly direction, and thereafter saw it return one hour and forty-two minutes later.

The testimony shows the Agents made the following assumptions when they set up their observation point at 2:00 a.m.:

1) There would be an illegal alien crossing after the bad weather;

2) It would be near a weekend;

3) The aliens would be picked up by a vehicle either going in an easterly or westerly direction;

4) The vehicle would travel between 2:00 a.m. and 6:00 a.m.;

5) The vehicle would be large enough to hold between eight to twenty aliens.

The evidence shows that the Agents lacked information as to certain key matters:

1) The Agents had no information that there would be any aliens smuggling on the night in question;

2) The Agents had no knowledge that aliens had crossed the border in the early evening of January 30, 1977 (J.A. 85);

3) The Agents had no knowledge of what particular vehicle would pick the aliens up (J.A. 63);

4) The Agents had no knowledge as to what direction the vehicle would travel before or after it picked up the aliens (J.A. 92);

5) The Agents did not notice any suspicious activity regarding the vehicle before the stop.

All of the above raises certain questions:

1) If the Agents really believed that a vehicle would pick up aliens between milepost 119 and 122 why did they station themselves 27 miles away at milepost 149 so that they could observe both Highway 286, at the road coming from Sasabee, as well as Highway 86? Why didn't they set themselves up at approximately milepost 122 and thereby narrow the scope of the area to be included in their search area?

2) If the Agents really believed the smuggling would take place on or near a Sunday, why didn't they go out to the area around Sunday, January 23rd, which was the first Sunday after January 16th?

3) Why didn't they check the area for tracks during the two-week period between January 16th and January 31st?

4) Since Sells, Arizona, on Highway 86, is the center of the Papago Indian Reservation and obviously has much vehicular traffic as does the Kitt Peak Observatory, which is just off Highway 86, and which can only be reached from Highway 86, why didn't the Agents exclude these two sites? Common sense indicates these sites should have been excluded because the Agents knew that the Kitt Peak telescopes

> are primarily used at night and by 6:00 a.m. the sky is starting to get light. Surely it is to be expected that after a night of using the telescopes that people would be coming from Tucson to pick up astronomers, technicians or other employees. By simply narrowing the areas the Agents could easily have excluded Sells and Kitt Peak.

An examination of the above leads to the conclusion that neither probable cause nor founded suspicion existed when the Agents decided to stop Respondent's vehicle.

c) Founded Suspicion

A founded suspicion requires that there be some specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain illegal aliens. *United States* v. *Brignoni-Ponce, supra.* In that case this court pointed out factors to be considered. It said consider (1) information about recent border crossings (in the instant case they were two weeks old); (2) erratic driving or evasive driving (there was none in this case); (3) aspects of the vehicle (our profile includes every vehicle but sedans and some commercial vehicles); (4) vehicle appears loaded (not in the instant case); and (5) Agents recognize persons in vehicle as Mexicans (in the instant case the Agent couldn't even see the driver (J.A. 81) or the occupants (J.A. 82) before the stop.

Terry v. *Ohio,* 392 U.S. 1, 20 L.Ed 2d 889, 88 S. Ct. 1868, involved an on-the-street confrontation bet-

ween a police officer and an individual whose activities raised his suspicions, and who he feared might have a gun. The court discussed dealing with a rapidly unfolding and dangerous situation on city streets and allowed a stop for questioning and a search for a weapon if there is a suspicion that the person is armed. This court said that the test for this stop and frisk was if the facts available to the officer when judged against an objective standard lead to the belief that the action was warranted. The court went on to say that it would not sanction hunches as a substitute. In *Adams* v. *Williams,* 407 U.S. 143, 32 L.Ed 2d 612, 92 S. Ct. 1921, the test was satisfied when the officer had been told by an informant that the defendant was seated in a car nearby and that he was carrying narcotics and had a gun at his waist. The officer went to the defendant and asked him to open the door. When the defendant instead rolled down the window, the officer reached in and took the gun from his waist.

The facts in *Terry* and *Adams* are entirely different from the instant case. Our facts are more akin to those in *Brown* v. *Texas,* 443 U.S. 47, 61 L.Ed 357, 99 S. Ct. 2637, and *Reid* v. *Georgia,* No. 79-448 (June 30, 1980).

In *Brown* v. *Texas, supra,* an officer saw two men who he believed had been together or were about to meet, and saw them walk off in a different direction. The officer asked the Appellant to identify himself and to explain what he was doing there. The Appellant refused. The officer said that this particular area of El Paso was a high-drug problem area. The officer also

said that the defendant looked suspicious and he had not seen that subject in the area before.

This Court found the stopping was unconstitutional since the Appellant's activity was no different from that of other pedestrians in the neighborhood. There was no basis to suspect Appellant of any misconduct.

This Court said that you must weigh the gravity of the public concern served by this seizure, and the severity of the interference of the individual's liberty. The reason for this balancing to to assure that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." (P. 362)

In *Reid,* the Petitioner arrived at the Atlanta airport in the early morning hours, and was seen leaving the plane by DEA Agents. They observed him separated from another man who was carrying a shoulder bag like the one that Petitioner carried. As they proceeded through the concourse, the Petitioner occasionally looked in the direction of the other man, and when they reached the main lobby, the other man caught up with the Petitioner and they spoke briefly. They then left the terminal together and were stopped outside by a DEA Agent who found that the airline tickets for both of them had been purchased with Petitioner's credit card and further showed that they had stayed in Ft. Lauderdale only one day. The Agent said the man appeared nervous and was asked to return with him. When they entered the terminal Petitioner dropped his shoulder bag and ran. The bag contained cocaine.

Based upon the following evidence this court found the stop impermissible:

1) Petitioner arrived in Ft. Lauderdale, which is a place where a great deal of cocaine is sold; and

2) It was in the early morning when most law enforcement activity is diminished;

3) Petitioner's companion appeared to be hiding the fact that they were traveling together; and

4) They had no luggage other than shoulder bags.

This court concluded that the agent could not, as a matter of law, have reasonably suspected the Petitioner of criminal activity on the basis of these observed circumstances. The court said of the evidence relied upon only the fact that the Petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances fit a large category of presumably innocent travelers who would be subject to virtually random seizures were the court to conclude that with as little foundation as there was in this case it could justify a seizure. The court went on to state, citing in part, *Terry* v. *Ohio, supra,* at 27-28:

> "The agents belief that the Petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or 'hunch', than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.'"

The Court found that the Petitioner was illegally seized.

In *Delaware* v. *Prouse, supra,* this court said:

> "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure — limited in magnitude compared to other intrusions but nonetheless cognizable — at the unbridled discretion of law enforcement officials." P. 672.

Comparing this language to the instant case, we see officers, who, looking for aliens, are prepared to stop and search virtually any vehicle making a round-trip within an approximate time span of one and one-half hours. It is obvious that many innocent people could be making that round trip. Examples of this are:

1) Someone going from Tucson to Sells to either pick someone up or drop them off and then return to Tucson;

2) Someone going to Kitt Peak National Observatory to take Astronomers or others to the telescopes or going there to pick them up after a night of viewing;

3) A vehicle traveling on Highway 86 going to Ajo or to the border crossing at Lakeville in order to enter Mexico to go camping or fishing at the resort area of Puerto Penasco (Rocky Point);

4) Someone going to Organ Pipe Cactus National Monument (just south of Why, Arizona); and

that vehicle having car trouble and deciding to return to Tucson.

Since it does not suit the Government's position they argue that an innocent explanation for the trip is unlikely. It doesn't take much imagination to see the Government in another case arguing any of the above possibilities to be an innocent explanation if to do so would suit their purpose. This is your basic — 'use it if it helps' and 'ignore it if it hurts' tactics. There has been much of this throughout the Government's brief. In addition to examples previously mentioned herein, the Government at footnote 9 of its Brief states that Cortez voluntarily opened the door of the camper. They make this seem like an undisputed fact. They don't mention his testimony where he stated he was told to open the camper by the Agent (J.A. 122). Their brief neglects to point out that the Agents who were supposedly sure that aliens would be picked up at milestone 122 stationed themselves at an elevated point 27 miles down the road so that they could watch both Highway 86 and Highway 286 (J.A. 61, 89 and 114). The Government doesn't mention that the Agents didn't stop linen trucks that certainly were capable of carrying eight to twenty aliens and didn't even keep track of them (J.A. 64,90), and, finally, the Government never mentions that Agent Evans, after the stop, exited his vehicle and held a shotgun in his hands (J.A. 104).

At the least the Government is guilty of not reading the transcript of the Motion to Suppress closely, and at the most they are guilty of intentionally misstating and ignoring the facts.

At all times it must be remembered that these Agents intended not only to stop every vehicle in their profile but they also intended to search them. They were prepared to search vehicles based on their hunch of illegal activity being afoot. Not even *Terry* or *Adams,* supra, would allow a search based on the facts and inferences known to these Agents.

These are the Agents who think that the alien traffic will take place near a weekend and do not go to the area the weekend of Sunday, January 23rd. We are given no explanation as to why they skipped this weekend and instead waited two weeks. These are the Agents that arbitrarily excluded sedans and commercial vehicles from the types of vehicles they intended to stop and search, and are the same Agents who were making no effort to determine if vehicles were loaded down and heavy with the weight of eight to twenty aliens before stopping them. These are the Agents that made no effort to check for fresh alien tracks for the two weeks from January 16th to January 31st. These are the Agents who used their unbridled discretion for this stop and proposed search. The possibility of catching some aliens cannot justify the actions of the Agents which where based on hunches and assumptions that were not backed by facts.

If the Agents were sure that the pickup would take place at milepost 122 then their scope should have been narrowed so to only take in the area between milepost 119 and 122. The Agents could have set up around milepost 122 and then have watched for vehicles making

the round-trip in a few minutes. This narrowing of the area would certainly give more credence to their statement that they were sure chevron would be leading illegal aliens from the border to milepost 122, and by doing this they would have excluded many innocent users of the highway from being stopped and intruded upon.

The Government is correct when it says that founded suspicion can be obtained from circumstantial evidence. However, they make the mistake of confusing circumstantial evidence with hunches. Hunches do not equal a founded suspicion.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed. If it is not, this case should be remanded to the Court of Appeals for a decision on the issue regarding the 'mandacity' instruction.

Respectfully submitted,

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SEP 11 1980

No. 79-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Petitioner,

v.

JESUS E. CORTEZ AND PEDRO HERNANDEZ-LOERA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF FOR RESPONDENT PEDRO HERNANDEZ-LOERA

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QUESTION PRESENTED

Whether the profile employed by the Border Patrol to seize respondents was unlawful because it failed to establish a particularized suspicion that respondents were engaged in illegal activity.

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IN THE

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OCTOBER TERM, 1979

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JESUS E. CORTEZ AND PEDRO HERNANDEZ-LOERA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF FOR RESPONDENT PEDRO HERNANDEZ-LOERA

STATEMENT OF FACTS

Respondents, Pedro Hernadez-Loera and Jesus E. Cortez were convicted in the United States District Court for the District of Arizona on six counts of transporting illegal aliens in violation of Title 8, United States Code, §1324(a)(2). The judgment was reversed by the Ninth Circuit Court of Appeals holding that the arresting of-

ficers lacked a "founded" or "reasonable suspicion" that respondents were engaged in illegal activity and that the stop of respondents' vehicle violated their rights guaranteed by the Fourth Amendment to the United States Constitution. *United States* v. *Cortez* (Pet. App. 1a-16a). This Court granted the government's petition for certiorari on June 9, 1980.

A. Facts

On Monday, January 31, 1977, at 6:12 a.m., respondents, Pedro Hernandez-Loera and Jesus E. Cortez, were traveling east on U. S. Highway 86 in a pickup truck with a camper shell (J.A. 60, 65, 67, 68, 72). Border Patrol Agents Wayne Gray and Ronald Evans pulled out behind respondents' truck in a marked vehicle, turned on their red emergency lights and seized the truck near Milepost 149 on Highway 86 (J.A. 68, 69, 103).

Prior to making the stop, the agents did not observe any of the occupants or notice anything suspicious about respondents' vehicle. The vehicle, which was common to the area, did not appear to be heavily loaded, was not violating any laws or operating with any visible mechanical defects (J.A. 63, 65, 68, 68, 82, 85, 103, 107-108).

The seizure of the vehicle took place on the Papago Indian Reservation west of Tucson, Arizona (J.A. 25, 86, 87). (The map attached to the response to the petition for certiorari as "Exhibit A" may be helpful in tracing the events referred to herein.) Highway 86 is the

major east-west artery crossing the reservation and connecting Sells, the center of tribal government and largest town on the reservation, with Ajo, Casa Grande, Phoenix, and Tucson, Arizona (J.A. 86, 87). The highway is parallel to and lies approximately twenty-six miles north of the Mexican border (J.A. 21-22, 86, 87). Although the reservation is an alien trafficking area, this is equally true of the entire southern Arizona border area from Lukeville to Douglas, a distance of almost two hundred miles (J.A. 33).[1]

Sometime in late 1976, Border Patrol agents in the Casa Grande sector became aware of suspected alien traffic on the Papago Indian Reservation (J.A.18). This suspicion was based on tracks which were discovered by unidentified agents in an unspecified location (J.A. 18, 35).[2] On January 4 and 16, 1977, agents found tracks containing chevron prints that led from the Mexican border to Highway 86 at Milepost 119, which is approx-

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[1] The Court can take judicial notice of this fact, Stern and Grossman, *Supreme Court Practice* (5th ed. 1978).

[2] Petitioner erroneously asserts, at page 2 of its brief, that the chevron print was discovered near Sells on the Mexican border. In actuality, the testifying agent, James Rayburn, was unable to recall where the print was found, and, as stated above, Sells is approximately twenty-six miles north of the border (J.A. 35). Petitioner's brief, at page 2, also states that the chevron print was found in early December. The record reflects, however, that Rayburn learned of the print around that time, but did not know when it was discovered (J.A. 19).

imately six miles east of Sells. These tracks then followed the highway east for three miles until they disappeared on the road surface at Milepost 122 (J.A. 21, 51, 55, 91-92).[3]

In total the agents found four sets of tracks (J.A. 24, 52-53). Agent Gray said they were made at night by groups ranging in size from seven to sixteen people (J.A. 55, 57). He believed that the chevron groups traveled only on or near weekends although this is not substantiated by the record (J.A. 60).[4] After January 16, the agents frequently inspected the area for additional tracks, but apparently found none (J.A. 35).

Finally, the agents believed, due to the disappearance of the tracks onto Highway 86, that the chevron groups were picked up by a recovery vehicle (J.A. 26). The agents had never seen these people or the vehicle, and had no idea where the recovery vehicle came

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[3] Petitioner alleges, at pages 2, 14, and 20 of its brief, that the chevron groups traveled in a "sparsely populated area", but fails to point out that they reached a point only six miles east of Sells on Highway 86 which is a well-traveled road through the Papago reservation (J.A. 25, 64, 67, 80).

[4] Officer Gray testified that this belief was based on the fact that, "The two prior times *I had personally* tracked was near the weekend . . ." (emphasis added) (J.A. 60). In actuality, the chevron group was believed to have been active on Tuesday, December 28; Sunday, January 2 or Monday, January 3; Tuesday, January 11 or Wednesday, January 12; and Saturday, January 15 (J.A. 24, 39, 55, 58).

from or went to — north to Casa Grande and Phoenix, west to Ajo, or east to Tucson (J.A. 34, 41-42, 86-87, 92, 119).[5]

On January 31, 1977, Agents Gray and Evans were assigned by their superiors to patrol the Altar Valley, an area approximately thirty-five miles east of the chevron track sightings (J.A. 61-62, 80). The agents began their surveillance at 1:00 a.m. from Milepost 149 (originally referred to as Milepost 114 by Gray) on Highway 86, twenty-seven miles east of the point where the chevron groups reached the highway (J.A. 63, 93). The agents speculated that a chevron group might be active on that morning. They chose their position at Milepost 149 so that they could observe traffic both on Highway 86, which runs east and west, and Highway 286, which runs north and south through the Altar Valley to the Mexican Border (J.A. 60-62).

On the same day, Agents Gray and Evans constructed a profile for seizing and searching vehicles in order to determine whether alien activity had occurred on Highway 86 at Milepost 122 (J.A. 60, 62-65, 78, 79). Agent Gray intended to utilize the profile even though he had no information suggesting the crossing of a chevron group that night and even though such a cross-

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[5] There is clearly no support in the record for petitioner's assertion, at page 15 of its brief, that the agents had information regarding "the particular movements of the suspected pickup vehicle."

ing could have been completed before the agents were in position (J.A. 77-78, 85).

The agents' profile was predicated upon their supposition that the recovery vehicle would pass them heading west and return in the opposite direction. They implemented this profile even though Officer Gray expected the recovery vehicle to approach the Milepost 122 recovery site from the opposite direction (J.A. 69, 84).[6]

Within their profile, the officers allowed for a ninety minute period of absence in order to seize a vehicle (J.A. 64). They believed a vehicle could make the anticipated fifty-four mile round trip within this time limit (J.A. 64, 93). This same time frame easily permitted a vehicle to make the sixty-six mile round trip to Sells (J.A. 80). Agent Gray's testimony indicated that the chevron groups appeared to spend little if any time waiting for the recovery vehicle, that they were picked up soon after reaching the easily identifiable spot (Milepost marker 122), and that the round trip could

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[6] Petitioner's brief, at pages 3 and 20, is entirely misleading on this point. It attempts to rationalize Gray's inconsistent explanation. He testified that it was his belief that the recovery vehicle would approach the chevron group from the west (a vehicle passing the agents at Milepost 149 on its way to Milepost 122 would have been coming from the east) because, "We assumed that because the aliens were walking in an eastward direction after hitting the highway that apparently the vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction." (J.A. 69).

have been made in less than an hour (J.A. 91, 95, 97, 98).

Gray also hypothesized that there would be eight to twenty people in the chevron group (the largest group previously contained fifteen or sixteen people) and that they would travel in a vehicle capable of carrying that many people without arousing suspicion (J.A. 57, 63). The officers had no idea what type of vehicle was being used (J.A. 78) or whether the vehicle seized could contain 20 people without arousing suspicion (J.A. 74, 78). The profile included vans, pickup trucks with camper shells, U-Haul trucks, motor homes, trailers and other types of vehicles with Gray could not recall (J.A. 63).[7] Sedans and commercial vehicles were not included, although Gray testified that these vehicles could be used without arousing suspicion and that, due to the darkness, it was impossible to see how many people were riding in an automobile (J.A. 63, 79, 89-90, 99).

It was the agents' intent to stop and search every vehicle which met the criteria set forth above (J.A. 77-78).[8] They had received no information indicating

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[7] Petitioner's brief, at page 5, alleges that those types of vehicles were the ones "most commonly used for smuggling sizeable groups of aliens. . . (J.A. 63-64)." This is not reflected by Gray's testimony.

[8] Gray's testimony on this point directly conflicts with petitioner's assertion, at page 12 and 16 of its brief, that the agents only intended to briefly question the vehicle's occupants:

> "Q: So if you would have seen at that time during that time frame, your time frame of between 2:00 and 6:00 o'clock, if you had seen a van, a truck, a truck with a camper shell and a

that there would be alien traffic near Mileposts 119 or 122 on that morning (J.A. 85, 87-88). They had no information regarding the recovery vehicle actually used, its place or origin or its destination (J.A. 41-42, 86-87, 119).

Traffic on Highway 86 at Milepost 149 was normal for the time of day of the agents' surveillance. In a five-hour period fifteen to twenty vehicles traveling west and six to ten going east passed their location (J.A. 64, 67).

At 4:30 a.m., a vehicle going west toward Sells passed the agents, which Evans identified as a "greenish-yellowish" pickup truck with a camper shell (J.A. 103-104). Although Gray, who was closer to the road, testified that it was too dark at that time to identify the color (J.A. 66), he did obtain a partial license number, "GN 88" (J.A. 65).

One hour and forth-two minutes later, at 6:12 a.m., a pickup truck passed the agents heading east (J.A. 67). They believed it to be the same vehicle that they had seen at 4:30 (J.A. 67, 104).[9]

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motor home, a trailer, all these vehicles, go west and return east, you would have searched every single one of them?

* * *

A. Had they been capable of hauling this amount of aliens well hidden, you bet," (J.A. 78). (See also J.A. 77).

[9] Respondent Cortez, a resident of Phoenix, testified that he traveled through Casa Grande and then south until he joined Highway 86 and headed east to Sells, a route he believed to be shorter than going through Tucson (J.A. 119-120). By taking this route, he would have passed the agents only once headed in an easterly direction (J.A. 92).

The agents pulled out behind respondents' vehicle and ascertained that the license number was "GN 8804". They then made the decision to stop the vehicle (J.A.68). At the time of the seizure, the agents had observed nothing unusual about the vehicle or its manner of operation, nor had they seen its occupants (J.A. 63, 65, 68, 78, 82, 95, 103, 107-108). They, nevertheless, intended to search the vehicle because it fit their profile (J.A. 77, 78).

The vehicle stopped when signalled to do so by the Border Patrol officers (J.A. 68). Cortez alighted from the driver's side and met Agent Gray at the rear of the pickup truck (J.A. 68-70). While this occurred, Agent Evans, with a shotgun at port arms, secured the site (J.A. 104-105). Gray questioned Cortez about his citizenship and told him to open the camper door (J.A. 121-122).[10] Six aliens, a satchel, a flashlight and respondent Hernandez' chevron soled shoes were discovered as a result of this search and seizure (J.A. 70-71)

B. Court Of Appeals' Ruling

Petitioner's brief, at pages 7-8, quotes language employed by the Ninth Circuit Court of Appeals in reversing the denial of respondents' motion to suppress.

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[10] Agent Gray testified that respondent Cortez opened the camper door without being asked or told to do so (J.A. 70).

However, petitioner, at the bottom of page 7 of its brief, omits that portion of the opinion which relies upon decisions of this Court. The omitted portions are as follows:

> The quantum of cause necessary in such (Fourth Amendment seizure) cases was established by the Supreme Court in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). "[0]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country". 422 U.S. at 884, 95 S.Ct. at 2582.
>
> * * *
>
> As Mr. Justice Harlan said, discussing the Terry standard in his concurring opinion in *Sibron* v. *New York*, 392 U.S. 40, 73, 88 S.Ct. 1889, 1907, 20 L.Ed.2d 917 (1968), '[T]here must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity . . . "(emphasis the court's) (Pet. App. 5a, 7a)

SUMMARY OF ARGUMENT

This case presents the issue of whether border patrol officers will be permitted to seize vehicles targeted for suspicion based solely on a subjectively developed profile without a particularized suspicion regarding the individual seized. The answer to this question will determine whether Border Patrol officers in the future will be permitted to conduct random stops with less than a founded suspicion or whether they will be required to

employ established surveillance techniques. The validity of a founded suspicion seizure must be evaluated on the totality of relevant circumstances and "specific and articulable facts taken together with rational inferences from those facts." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). The Fourth Amendment demands objective particularity prior to seizing an individual in order to minimize governmental intrusions upon the American public.

The officers objectively knew, at most, that respondent traveled past the back to their position in over 90 minutes. Everything else the officers utilized to stop the vehicle was based upon assumptions derived from either stale, inaccurate or non-existent information. Even assuming the validity of the officers' assumptions, no rational nexus existed between those assumptions and respondents sufficient to justify this seizure. The particularized suspicion required by *Terry* v. *Ohio*, supra, and related cases was never established. The officers' random seizure of vehicles within their subjectively created profile does not comport with Fourth Amendment protections afforded individuals, and therefore was not good police work. The seizure of respondents was arbitrary and therefore unlawful. *United States* v. *Brignoni-Ponce,* supra, at 882; *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979).

THE PROFILE EMPLOYED BY THE BORDER PATROL TO SEIZE RESPONDENTS WAS UNLAWFUL BECAUSE IT FAILED TO ESTABLISH A PARTICULARIZED SUSPICION THAT RESPONDENTS WERE ENGAGED IN ILLEGAL ACTIVITY.

A. Petitioner Is Required To Demonstrate More Than A Founded Suspicion In Order To Justify The Intrusion Occasioned By The Seizure Of Respondents.

The officers' stop of respondents' camper for the purpose of discovering aliens was not the "modest" intrusion of an investigative stop sanctioned by this Court in *United States* v. *Brignoni-Ponce*, supra, at 880.[11] In *Brignoni-Ponce*, the officers seized the vehicle for the sole purpose of briefly questioning the occupants about their citizenship and immigration status. 422 U.S. at 875, 880. Agents Gray and Evans seized respondents for the express purpose of searching the camper for aliens solely because the camper fit their profile (J.A. 77, 78). Petitioner, at page 16 of its brief is entirely incorrect in argu-

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[11] The government cannot and does not contend that a seizure did not occur. The issue is well settled that when a vehicle is stopped by a law enforcement officer and its occupants detained, a "seizure" has occurred. *Delaware* v. *Prouse*, supra, at 653, citing *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States* v. *Brignoni-Ponce*, supra, at 878; cf. *Terry* v. *Ohio*, supra, at 16.

ing that the intrusion complained of here is no more severe than the one in *United States* v. *Brignoni-Ponce*, supra.

Assuming a seizure less intrusive than an arrest,[12] this Court evaluates its reasonableness by balancing " 'the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, supra, at 878." *Brown* v. *Texas*, 443 U.S. 47, 50 (1979). The reasonableness of a seizure under this balancing test depends on the facts of each individual case. *Delaware* v. *Prouse*, supra, at 654.

The societal interest in this case is identical to the one in *United States* v. *Brignoni-Ponce*, supra. 442 U.S. at 875. In both cases, the arresting officers' concern was the discovery of aliens illegally in this country. It is noteworthy, however, that the problem presented by illegal aliens is basically an economic one. *United States* v. *Brignoni-Ponce*, supra, at 878-879. Although this is admittedly an important interest, as a matter of policy it does not constitute as great an interest as those presented in *Delaware* v. *Prouse*, supra (safety on streets and

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[12] A roving patrol stop of a vehicle is much more intrusive than either a checkpoint stop, which provides notice and security of equal treatment to all persons, or the stop of a pedestrian who has the right to walk away rather than have his freedom from restraint interrupted. *United States* v. *Mendenhall*, 78-1821 (May 27, 1980) slip op. 11; *United States* v. *Martinez-Fuerte*, supra, at 558.

highways), *Brown* v. *Texas*, supra, and *Reid* v. *Georgia*, 79-448 (June 30, 1980) (stopping the flow of dangerous drugs), and *Terry* v. *Ohio*, supra (the prevention of crimes against property as well as the protection of the lives of police officers and bystanders). These cases relate note only to economics but also to the protection of human life, a more compelling interest than the seizure of aliens. This interest is also not as compelling as the others for the simple reason that the detection of aliens is a much easier law enforcement objective than a discovery of narcotics or unlicensed drivers. Petitioner's expressed desire to protect aliens is a makeweight argument in this case for the reason that nothing available to the officers suggested that any person in respondents' vehicle was in danger. *United States* v. *Brignoni-Ponce*, supra; *Sibron* v. *New York*, 392 U.S. 40, 64 (1968).

In determining the seriousness of particular intrusions this Court has looked to the scope, purpose, and societal impact of the intrusions. In *United States* v. *Brignoni-Ponce*, supra, for example, the fact that Mr. Brignoni was stopped for the purpose of answering one or two questions and possible producing documents demonstrating his right to be in this country, a procedure usually consuming less than one minute, led the Court to conclude that the intrusion was minimal. 442 U.S. at 880. However, the Court held this seizure unreasonable in spite of its limited nature because the basis for stopping the vehicle did not justify a reasonable belief that a crime was being committed. 442 U.S. at 886.

The situation here is different because the officers seized the vehicle for the purpose of searching it and did search it (J.A. 78, 122). *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). This can hardly be deemed as minor an intrusion as a one minute detention for questioning. This intrusion was also more severe because it violated two factors which have been held significant by this Court: the possibility of abuse due to law enforcement officers' unrestrained discretion, and the resultant resentment and anxiety which would occur if such practices are allowed to continue. As the Court in *Brown* v. *Texas*, supra, at 51 stated:

> A central concern in balancing these competing considerations (the public interest and the individual's right to personal security) in a variety of settings has been to assure than an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979); *United States* v. *Brignoni-Ponce*, supra, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, supra, at 633. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976).

The intrusion does not qualify as minimal under either of these criteria.

The officers' suspicions focused on, and permitted the seizure of, not only this particular vehicle and respondents, but on a large class of vehicles without regard to their appearance or that of their occupants.

In addition, the seizure of respondents' vehicle was not "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, supra, at 51. It is obvious that the officers' scheme did nothing to prevent the seizure of profile vehicles which otherwise did not appear to be engaged in criminal activity. Any limitations on the agents' conduct in regard to the seizure of respondents were non-existent or, at best, self imposed.

Petitioner argues, at pages 23-25 of its brief, that the Ninth Circuit's decision imposes an unworkable burden on law officers and that Gray and Evans performed "good detective work" in seizing respondents' vehicle. Good detective work, however, required less intrusive, but equally effective measures for the detection of aliens.

Although the chevron tracks were always found in the same place, Gray and Evans were positioned twenty-seven miles away from that area (J.A. 93). This was apparently due to the fact that their superiors disagreed with Gray's hunch that a chevron group might be active during the morning in question (J.A. 61-62). The logical approach would have been to station agents near Milepost 122, where the tracks consistently disappeared onto the highway, to enable the officers to see the group emerge and to ascertain the specific recovery vehicle be-

ing used. This was particularly important in light of the fact that the agents had no information regarding the type of recovery vehicle used, where it came from, or its ultimate destination (J.A. 78, 92). It would have been good police work for the agents to be in a location where they could apprehend the smugglers without unnecessary intrusions upon the privacy of innocent travelers.

Two other reasonable approaches would have allowed Agents Gray and Evans to maintain their position in the Altar Valley and obtain information about the chevron group on the morning in question. One option available to the officers was the utilization of a sensor at Milepost 122 to determine the time of any suspected activity. The sensor would have given the agents a narrow time frame within which to expect the recovery vehicle. This practice was in operation in the Altar Valley (J.A. 89).

The other option, based on the agents' assumption that respondents made a round trip past their position, was to follow the vehicle, obtain a license number and description and then have the vehicle followed until sufficient information could be obtained to either seize the vehicle or conclude that it was engaged in no illegal activity. In *Sibron* v. *New York*, supra, Justice Harlan, concurring, recommended a similar approach. 392 U.S. at 73. This option could have been used alone or in conjunction with a sensor.

Finally, the agents could have presented their profile to a magistrate for a warrant to search and seize vehicles

which fit that description. See *United States* v. *Martinez-Fuerte*, supra, at 555; *Almeida-Sanchez* v. *United States*, supra, at 283 (Powell, J., concurring). This procedure would have provided the "neutral limitations on the conduct of individual officers" which this Court considers very important. *Brown* v. *Texas*, supra, at 51.

The profile's failure to circumscribe the officers' discretion clearly establishes that the intrusion herein was neither minimal nor designed to reasonably evaluate the "degree of community resentment aroused" by the projected seizure of all profile vehicles. *Terry* v. *Ohio* supra, at 17, fn. 14; *United States* v. *Martinez-Fuerte*, supra, at 558.

A seizure based on a profile developed by officers in the field, in an effort to locate offenders who had not been active for more than two weeks in an area twenty-seven miles away, and which could result in the seizure and search of numerous innocent travelers, can hardly be deemed a minimal intrusion. The Fourth Amendment demands that such a severe intrusion be based on either probable cause or, at the very least, be carried out pursuant to a particularized suspicion as to each and every vehicle to be seized. *Brown* v. *Texas*, supra, at 51; *United States* v. *Brignoni-Ponce*, supra, at 881; *Carroll* v. *United States*, 267 U.S. 132, 155-156 (1925).

B. The Profile Employed By The Border Patrol To Seize Respondents Was Unlawful Because It Failed To Establish A Particularized Suspicion That Respondents Were Engaged In Illegal Activity.

Assuming arguendo, that a minimal intrusion as envisioned by *United States* v. *Brignoni-Ponce,* supra, occurred when the officers seized respondents, the seizure was unlawful in light of the information available to the agents. The Fourth Amendment to the Constitution protects the individual in an automobile from unfettered intrusions by law enforcement officers. *Delaware* v. *Prouse,* supra, at 661; *United States* v. *Brignoni-Ponce,* supra, at 882; *Carroll* v. *United States,* supra, at 155-156.

In order to seize a particular vehicle for the purpose of questioning its occupants about suspected criminal activity, a Border Patrol officer must be "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *United States* v. *Brignoni-Ponce,* supra, at 884.

In determining the validity of any seizure, this Court recently reiterated that "a seizure must be based upon specific, objective facts indicating that society's legitimate interests require the seizure of this particular individual." *Brown* v. *Texas,* supra, at 51. See also *Beck* v. *Ohio,* 379 U.S. 89, 91 (1964). The particularity requirement has consistently been employed by this Court.

Delaware v. *Prouse,* supra, at 661; *United States* v. *Brignoni-Ponce,* supra, at 884.

This Court examines each particular case in light of the information the officers had available to them at the time the order to stop was given. Nothing which was discovered after the seizure took place, such as respondent Cortez's hurried exit from the truck or the movement of the curtain in the camper's back window, can be considered in determining the validity of the stop. *Sibron* v. *New York,* supra, at 63; *Bumper* v. *North Carolina,* 391 U.S. 543,fn. 10, (1968); *United States* v. *DiRe,* 332 U.S. 581, 595 (1948).

In an effort to assist both the lower courts and law enforcement officers in the performance of their duties, this Court, in *United States* v. *Brignoni-Ponce,* supra, at 884-885, listed several factors to be considered in establishing the basis for founded suspicion. These factors can be separated into three general areas which concern the vehicle, its occupants, and the area of seizure. The relevant factors are:

> ". . . the characteristics of the area in which they (the officers) encounter the vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic . . . information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers . . . Aspects of the vehicle itself may justify suspicion . . . The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe

> person trying to hide. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico. . . . In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. (Citations omitted). 442 U.S. at 884-885.

The Government boldly asserts that the *Brignoni-Ponce* factors are so completely satisfied that not only a founded suspicion but also probable cause have been established. The latter argument was never asserted to the trial court, the Ninth Circuit Court of Appeals, or even to this Court in its petition for writ of certiorari. The Border Patrol agents' expressed intent to search and seize every vehicle which met their profile does, however, raise a substantial question about the government's ability to rely upon a founded suspicion rather than probable cause (J.A. 78). See *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973). A careful examination of the record establishes that neither test was satisfied and that the resultant seizure was unlawful. The record before this court will be analyzed in *seratium* in terms of the subjective profile created by Agent Gray and the enunciated *Brignoni-Ponce* factors.

Agent Gray testified that the seizure conducted herein was predicated upon the profile he developed in an effort to apprehend aliens led by "Chevron."[13] This

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[13] Contrary to petitioner's position, at page 24 of its brief, that no profile was utilized, this officer's testimony and the record reflects that they acted upon a profile (J.A. 78, 79). Petitioner's

profile was directed at the seizure of vehicles which would not arouse suspicion. If a vehicle did not arouse suspicion, Grey felt it was suspicious. A profile which permits a seizure on nothing more than this is not only arbitrary but illogical.

A criminal profile, at very best, is a compilation of typical characteristics about a particular type of criminal based upon empirical or objective data and an accumulation of many officers' past experiences and observations which are used to focus suspicion on an individual. A profile without any objective foundation has no validity. The profile implemented by Agent Gray was not based upon any empirical data or the accumulation of objective data establishing the specific characteristics of the vehicle to be seized.[14]

Assuming only one vehicle was being used, any profile vehicle to be seized had to be related to the number of anticipated passengers. Agent Gray knew that in the past alien groups at Milepost 122 ranged in size from seven to fifteen or sixteen people (J.A. 55,57). He decided, however, that the next chevron group to enter the United States would range in size from eight to twenty.

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previous position was that a profile had been employed. See petitioner's request for hearing before the Ninth Circuit Court of Appeals, pages 12 and 13.

[14] The record does not reflect that Gray had any experience in developing a profile. The government appears to concede as much at page 25 of its brief in stating that the profile was not based on the agent's prior experience with alient smuggling.

Officer Gray had no objective information, either direct or circumstantial, to reach this conclusion. His conclusion can only be characterized as a hunch.

A similar hunch was employed by Agent Gray in determining the type of recovery vehicle to be used. The agents had never seen the vehicle or vehicles used, nor did they have any information regarding the vehicle or vehicles. Gray and Evans intended to seize all vehicles capable, without arousing suspicion, of carrying between eight and twenty aleins that went past their position and returned within ninety minutes (J.A. 63). This profile completely disregarded Gray's original assessment that the recovery vehicle would approach the aliens from the west and continue eastbound rather than make a return trip (J.A. 77, 78).

The profile was underinclusive in that, although the officers admitted sedans, station wagons, and commercial vehicles could carry the required number of aliens without arousing suspicion, these vehicles were not subject to either suspicion or seizure. Indeed, petitioner's brief, at pages 13-14, quotes language from *United States* v. *Brignoni-Ponce,* supra, at 885, which recognizes that station wagons are frequently used to transport illegal aliens. Agent Gray even admitted that sedans and station wagons, especially during hours of darkness, were clearly capable of carrying at least eight people without arousing suspicion (J.A. 63). No reason was ever offered explaining why these vehicles were not subject to suspicion. The officers, at any rate, decided to focus their attention upon pickups, pickups with camper

shells, vans, motor homes, and other unspecified vehicles capable of carrying the proposed eight to twenty aliens (J.A. 63, 78, 99).

Another class of vehicles, commercial vehicles, was exluded by the agents because they assumed company policies prohibited use of the vehicles for illegal purposes (J.A. 90, 100). This view assumes too much. It is axiomatic that employees could engage in illegal conduct without their employers' knowledge. Company vehicles are sometimes provided to workers for their private use during their free hours. It is also not unusual for company vehicles to be sold for private use when they are old or no longer needed. These factors were ignored by the agents and no rational explanation exists for the agents' assumptions.

The automobile profile was overly broad because it created a non-particularized suspicion of persons going by the agents' position without requiring anything additionally suspicious or unusual by way of information or observation. For example, the vehicle seized herein was not speeding or being operated in a furtive manner, suggesting, as is discussed in *Brignoni-Ponce,* an attempt to evade the agents or detection (J.A. 95). The agents in effectuating the stop completely disregarded the fact the vehicle neither appeared to be heavily loaded nor had any visible mechanical defects (J.A. 107-108). The Court in *Brignoni-Ponce* considered the manner of operation and appearance of a vehicle important in establishing a founded suspicion. When these factors suggest innocent conduct they also negate a founded suspicion. This pro-

file is constitutionally overbroad because the agents in applying it, ignored the rational inferences suggesting innocence to be drawn from their observations. *Reid* v. *Georgia,* supra.

It is quite obvious that the profile utilized herein was created without any indicia of reliability designed to minimize the intrusion upon the general public. *Delaware* v. *Prouse,* supra, at 661, 662-663. The profile, aside from being arbitrary and without any limitations upon the officers' discretion, did not encompass a particularized suspicion of criminal activity based upon objective facts indicating that "society's legitimate interests required the seizure of this particular individual." *Reid* v. *Georgia,* supra; *United States* v. *Mendenhall,* supra; *Brown* v. *Texas,* supra, at 51; *United States* v. *Brignoni-Ponce,* supra, at 884.

The officers who were twenty seven miles away from the site of suspected criminal activity could not reasonably have concluded respondents had been there. The profile did nothing to rule out that any vehicle seized had gone to Kitt Peak National Observatory, had equipment problems and was returning to Three Points or Tucson for repairs, or had gone to Sells. The seizure was not the product of any particularized suspicion requiring that respondents should be questioned or their vehicle searched for illegal aliens. As this Court pointed

out in *Delaware* v. *Prouse,* in reaffirming the prohibition of the exercise of unbridled discretion by law enforcement officers:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . ." 440 U.S. at 661, quoting from *Terry* v. *Ohio,* supra, at 22.

The officers ignored every thing they saw or knew negating any reasonable suspicion of criminal activity by relying completely upon the profile.

The fact that the profile was designed solely for the purpose of seizing cars on January 31, 1977, did not eliminate the need for it to be rationally ralated to the facts available. The Fourth Amendment's protection against unreasonable seizures required the profile be designed in a manner that would preclude the seizure of all persons making a return trip on Highway 86. The profile, contrary to the government's suggestion at page 24, was not established as a result of weeks of investigative efforts; it was created the night of the seizure in an effort to focus suspicion on an unknown vehicle and its unknown direction of travel.

The officers' failure to position themselves in a location which would have helped establish a particularized suspicion makes the seizure arbitrary. *Delaware* v. *Prouse,* supra. The profile herein was

developed on an inarticulate hunch which might have justified surveillance but was not an articulable suspicion of criminal conduct justifying a seizure. The officers saw no crime being committed which they were obliged to interrupt, therefore, they should have continued their investigation. *Sibron* v. *New York,* supra, at 73 (Harlan, J., concurring); *Brown* v. *Texas,* supra.

The use of this profile is equivalent to the practice condemned in *Brignoni-Ponce* wherein the government seized a vehicle simply because of the occupants' ethnic appearance. Gray's profile permitted the seizure of vehicles which did not specifically arouse a reasonable suspicion, thereby unconstitutionally permitting the officers to exercise their unfettered discretion. *Ybarra* v. *Illinois,* 444 U.S. 85 (1979); *Delaware* v. *Prouse,* supra; *United States* v. *Brignoni-Ponce,* supra.

The profile failed to consider the agents' inability to observe the occupant's or driver's demeanor as a means of negating any reasonable suggestion of criminal activity. *United States* v. *Brignoni-Ponce,* supra; *Brown* v. *Texas,* supra; *Ybarra* v. *Illinois,* supra; *Sibron* v. *New York,* supra. Very little needs to be said about these factors, simply because the officers did not see anyone in respondents' vehicle (J.A. 82). They obviously had no idea how many passengers there were nor whether any persons were attempting to conceal themselves. There was no information available which demonstrated that respondents' vehicle carried aliens.

The occupants, their appearance and activities are highly relevant factors in any seizure. This Court has

never upheld a seizure for which a founded suspicion was required where the officers had no information regarding the person seized. It is impossible to reasonably conclude that criminal activity may be afoot when the people allegedly committing the crime are unknown and unseen. *Brown* v. *Texas,* supra, *Ybarra* v. *Illinois,* supra; *Delaware* v. *Prouse,* supra; *United States* v. *Brignoni-Ponce,* supra, Sibron v. *New York,* supra.

Nothing available to the officers under the remaining *United States* v. *Brignoni-Ponce* factors related to the area of suspected criminal activity created a founded suspicion. Petitioner argues that a totality of circumstances analysis would require a reasonable person to suspect criminal activity warranting a limited intrusion. The record simply does not support this conclusion. Justice Harlan, concurring, framed the appropriate question in *Sibron* v. *New York,* supra, at 75, when he inquired as to whether a "prudent and reasonable man (such as a magistrate, actual or hypothetical)" would believe that a particular person has committed or is committing a crime simply because of his location. The Court held that location alone was not sufficient in *Sibron* v. *New York,* supra, as well as in all other decisions in which the issue has arisen. *Reid* v. *Georgia,* supra; *Brown* v. *Texas,* supra; and *Ybarra* v. *Illinois,* supra.

A similar conclusion is dictated here. The agents' last information about any suspected alien activity at Milepost 122 related to tracks made fifteen days prior to the seizure. The officers, nevertheless, assumed the

Milepost 122 area was a continuing smuggling area. This assumption had no factual basis. The absence of alien traffic when coupled with the lack of any recent information about expected or actual alien activity severely undermined the agents' assumption that this was a smuggling area.

The record fails to establish a rational nexus between respondents and the area sufficient to create a reasonable basis for seizing them. The officers' direct observations certainly negated any inference of criminal activity by respondents in an area twenty seven miles away. *Reid* v. *Georgia,* supra; *Brown* v. *Texas,* supra. The officers could only speculate as to whether the vehicle herein had ever been in the smuggling area. See *Henry* v. *United States,* 361 U.S. 98 (1959).

The ninety-minute travel time allotment is meaningless for purposes of a particularized suspicion. The agents testified the recovery process was quick (J.A. 95, 97, 98). A vehicle traveling at 55 m.p.h., as was respondents', would make the return trip within one hour. The fact that respondents' vehicle returned well beyond the agents' allotted time period should have excluded it from suspicion and seizure. The agents have concluded that respondents did not recover any aliens.

Petitioner's request for this Court to authorize roving patrols to seize all vehicles without a particularized suspicion whenever a vehicle comes from a suspected area of alien activity is a return to the procedure condemned in *Almeida-Sanchez* v. *United States,* supra, and contrary to this Court's decision in *Reid* v. *Georgia;*

supra, *Brown* v. *Texas,* supra, *Ybarra* v. *Illinois,* supra; and *United States* v. *Brignoni-Ponce,* supra.

For purposes of creating a founded suspicion, Three Points, Arizona at Milepost 149 is relevant only for traffic traveling north on Highway 286, a border access route. The officers herein were assigned by their superiors to surveil the Altar Valley which is directly south of Milepost 149 and across the mountains to the east of Milepost 122. The presence of respondents as they traveled east across Highway 86 past Milepost 149 in and of itself created no founded suspicion to seize them. The traffic along Highway 86 was normal and respondents at all times traversed the highway just like any other travelers. Nothing about the area of detention suggests criminal activity. The officers could only speculate about such activity. This type of speculation does not comport with Fourth Amendment protections afforded individuals to whom:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, work place, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. *Delaware* v. *Prouse,* supra, at 662.

Respondents' right to freedom from restraint was violated when they were subjected to an armed seizure by officers who could not point to anything:

> . . . in the activities of the person observed or in his surroundings that affirmatively suggests particular criminal activity. *Sibron* v. *New York,* supra, at 73 (Harlan, J., concurring).

The judgment of the Ninth Circuit Court of Appeals was correct in holding there were "far too many innocent inferences to make the officers' suspicions reasonably warranted." (Pet. App. 8a). See *Reid* v. *Georgia,* supra. The decision of that Court is correct and should be affirmed. The alternative is to vitiate Fourth Amendment protections for persons who travel by automobile. *Delaware* v. *Prouse,* supra; *United States* v. *Brignoni-Ponce,* supra; *Almeida-Sanchez* v. *United States,* supra.

C. The Court Of Appeals Properly Held That The Evidence Failed To Provide A Founded Suspicion That Respondents Were Engaged In Illegal Activity.

1. The Court of Appeals correctly considered both direct and circumstantial evidence and properly interpreted the applicable law in reaching its decision.

The petition for certiorari in this case accurately defined circumstantial evidence "as evidence from which an inference must be drawn to arrive at the proposition asserted. . ." (Pet. App. 15, fn. 8). An examination of this definition in conjunction with the Ninth Circuit

Court of Appeals' decision in the case at bar demonstrates that petitioner's argument B, at pages 18-25 of its brief, is entirely without foundation.

The Ninth Circuit has never made any legal distinction between direct and circumstantial evidence. *Rodella* v. *United States,* 586 F.2d 306, 312 (9th Cir., 1960), cert. denied, 365 U.S. 889 (1961); *United States* v. *Turner,* 528 F.2d 143, 162 (9th Cir., 1975), cert. denied, 423 U.S. 996 (1975). Petitioner even pointed out, in its petition for rehearing, at page 8, fn. 4, that the Ninth Circuit Court of Appeals has consistently relied on circumstantial evidence in founded suspicion cases. See *United States* v. *Laird,* 511 F.2d 1039 (9th Cir., 1975); *United States* v. *Clark,* 501 F.2d 492 (9th Cir., 1974), cert. denied, 419 U.S. 899 (1974). It is so unlikely as to be beyond belief that the court of appeals would overrule such a well established doctrine *sub silentio*. An examination of that opinion closes the door on petitioner's allegation that the court precluded the use of circumstantial evidence.

The Ninth Circuit opinion makes it clear at the outset that circumstantial evidence is relevant in determining whether a seizure violates the Fourth Amendment. This was accomplished by the court's utilization of the rule of law set forth by this Court in *United States* v. *Brignoni-Ponce,* supra, at 884:

> Officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that

> reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. (Pet. App. 5a)

It is obvious from the definition of circumstantial evidence set forth above that when "rational inferences" are relied upon, circumstantial evidence is being employed.

Petitioner complains, at page 19 of its brief, that:

> The standard suggested by the court of appeals conflicts with *Brignoni-Ponce* because it would make most of the factors there identified as significant by this Court — the characteristics of the area, its proximity to the border, usual traffic patterns, previous experience with alien traffic, recent border crossings and the type of vehicle stopped — either irrelevant or superfluous.

Contrary to petitioner's allegation, the Court of Appeals expressly relied on several of the *Brignoni-Ponce* factors as set forth above including the absence of recent border crossings and the innocent appearance of respondents' vehicle. Petitioner cannot reasonably complain about the court's failure to find significance in the usual traffic patterns in the area as they were not unusual. The fact that tracks had been discovered twenty-seven miles away from the agents' position over two weeks earlier provides no connection with respondents and therefore carries no weight. The characteristics of the area and its proximity to the border also did not aid petitioner. Respondents' vehicle was seized on a well traveled east-west highway. This

highway is not a border access route and lies more than twenty-six miles from the border.

Although *Brignoni-Ponce* set forth several factors to be considered, it did not require that every court express its opinion in regard to each of those factors in every case, or even that the list it provided was exhaustive. The Court of Appeals relied on all the *Brignoni-Ponce* factors which were relevant in this case.[15] The major fallacy in petitioner's argument is not that the Ninth Circuit refused to look to the factors set forth in petitioner's brief as listed above, but instead properly viewed that evidence as favoring respondents. It is clear from the court's opinion that it considered the available circumstantial evidence and correctly drew the inference that no founded suspicion existed for the seizure of respondents' vehicle (Pet. App. 7a-8a).

2. Particularized suspicion is an essential element of Fourth Amendment protections afforded individuals.

Petitioner appears to clothe an appeal for a radical change in Fourth Amendment law in its circumstantial evidence argument. Petitioner argues, at page 23 of its brief, that although the agents had no facts "associated

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[15] Certainly, if the agents had obtained reliable information that aliens had been seen in the area, if the road in question was a dead end, or if the stop was made on a minor north-south roadway a few miles from the border, the court would have considered that information.

with an individual, his appearance and his behavior," the seizure in question should be upheld. References are also made to the plethora of clues available to the agents that illegal aliens had been active in a distant area weeks earlier. There was, however, no rational nexus between those clues and respondents' vehicle.

Petitioner's argument basically amounts to a request to this Court to eliminate the particularity requirement which has consistently been employed in Fourth Amendment cases. Granting this request would destroy the protections provided members of our society by the founded suspicion requirement.

This Court requires that law enforcement officials possess specific and articulable facts providing a founded suspicion that the particular individual seized is engaged in wrongdoing. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* v. *Ohio,* supra, at 21, fn. 18. See also *Delaware* v. *Prouse,* supra, at 661-663; *Reid* v. *Georgia,* supra, *United States* v. *Brignoni-Ponce,* supra, at 884; *Adams* v. *Williams,* 407 U.S. 143, 146 (1972). This requirement was made crystal clear in *Brown* v. *Texas,* supra, at 51, where this Court, per Chief Justice Berger, held:

> To this end (preventing arbitrary invasions of privacy rights), the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the

seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse,* supra, at 663. See *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 558-562 (1976).

Petitioner accuses the Ninth Circuit of abandoning the tenets set down by this Court, when, in reality, the government seeks to have the law of founded suspicion discarded. The Court's answer to this request was framed in the words of Mr. Justice Jackson:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States,* 338 U.S. 160, 180 (Jackson, J., dissenting). *Almeida-Sanchez* v. *United States,* supra, at 274.

CONCLUSION

The Ninth Circuit Court of Appeals properly found no reasonable suspicion for the seizure of respondents' vehicle.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The basic legal issue presented by this case concerns the kind of information upon which officers policing the border may rely to make an investigative stop of a vehicle they suspect may be carrying illegal aliens. The heart of the court of appeals' holding lies in its requirement that the stopped vehicle or its occupants exhibit some specific suspicious attribute or behavior, and its corollary conclusion that the agents may not rely on deductions made from circumstantial evidence other than direct observation (what the court of appeals and respondents consider a "profile"). As to this central issue, we rest upon

the arguments adduced in our opening brief. We here address certain additional matters raised in respondents' briefs.

1. In reaching its decision of this issue, the court of appeals appeared to accept in large measure the facts as we have laid them out in our opening brief, but found them insufficient to justify the officers' actions. Respondents, however, challenge both the foundation for, and our characterization of, the evidence presented at the hearing on their motion to suppress. Even were respondents correct in many particulars, there would still have been sufficient reasonable suspicion to justify a brief stop of a vehicle in the border area to investigate suspected alien smuggling. In fact, however, their challenges are without merit.

a. Respondents claim (Cortez Br. 4-5; Hernandez-Loera Br. 4 & n.4) that there is no basis in the record for Border Patrol Officer Gray's testimony (J.A. 60) to the effect that the officers had reason to believe that Chevron preferred to travel on or near weekends. That testimony, however, is supported by other evidence in the record from which the district court could have concluded that three of the four sets of Chevron tracks previously observed had been made during or shortly after a weekend (the officers' surveillance and the stop at issue were made during the early morning hours of Monday, January 31, 1977).

Officer Gray testified (J.A. 55) that on Tuesday, January 4, he observed one set of Chevron prints that "appeared to be a day or two old" and another set that had been made "[a]pproximately a week [ago]." Thereafter, on Sunday, January 16, Officer Gray and another border patrol officer, James Rayburn, observed one set of Chevron tracks that they believed had been made the night before ("within the previous

twelve hours or so") (J.A. 39) and another set that Officer Gray estimated (J.A. 58) to have been "five days to a week old," which meant they had been made the previous Sunday, Monday or Tuesday.[1]

b. Respondents attempt (Cortez Br. 5; Hernandez-Loera Br. 5-6) to portray as groundless the officers' assumption (J.A. 62-63) that a Chevron-led group of aliens would begin its march at approximately 6:00 p.m. and would therefore arrive at milepost 122, the expected pickup point, between 2:00 and 6:00 a.m. (respondents apparently do not challenge the eight to 12 hour estimated duration of the march, but only the estimated departure time). This assumption, however, is amply justified by the record, which contains evidence that on January 30, 1977, it became dark at approximately 6:00 p.m. (J.A. 85) and that aliens on previous Chevron-led marches had been walking in the darkness from shortly after the beginning of their journey (J.A. 40, 56, 62-63).

c. Respondents also challenge (Cortez Br. 5-6; Hernandez-Loera Br. 4-5 & n.5, 6 n.6) both our assertion (U.S. Br. 3, 20) that the officers concluded that the pickup vehicle would approach the aliens from and return with them to a point east of the pickup point and the rationality of that conclusion.

Contrary to Respondent Cortez's contention (Br. 5-6), it is clear that the officers in fact proceeded on

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[1] Initially, Agent Rayburn testified (J.A. 24) that the latter set of tracks were made "some three to four days prior," which would have been a Wednesday or Thursday. Later in his testimony, he explained (J.A. 47) that because it had rained since those tracks had been made, it was not possible to say when they had been made. In any event, Agent Gray, not Agent Rayburn, participated in the January 31 stop of respondents.

the basis of such a conclusion, else they would not have focused their surveillance on vehicles that passed them traveling westward and returned traveling eastward (J.A. 64). Officer Gray explained why it was necessary for the officers to observe traffic in both directions (*ibid.*):

> The reason we were watching for the traffic in a westbound direction was for—to get possibly an idea of the vehicle and the time it took to see if it did come back by our location.

Nor was the assumption about likely direction of travel without a rational basis. Officer Gray testified (J.A. 59) that he and Officer Evans "assumed that because the aliens were walking in an eastward direction after hitting the highway that apparently the [pickup] vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction." Contrary to Respondent Hernandez-Loera's suggestion (Br. 6 & n.6, 23), Officer Gray must have been referring to the direction taken by the vehicle *after* it picked up the aliens, because a vehicle's traveling toward the west to meet the aliens would not have been at all inconsistent with their walking toward the east. Thus, the officers reasonably concluded that the pickup vehicle's destination was east of the pickup point on the ground that it was unlikely that the aliens, after a long overland march, would be walking away from their ultimate destination (J.A. 59, 84).[2]

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[2] Although the officers did not explain (perhaps because they were not asked) their reasons for believing that the pickup vehicle would approach the aliens from the east, common sense suggests that a vehicle that made frequent pickups would more likely come from its ultimate destination. Similarly, the aliens' action in walking east once they

Neither the existence nor the validity of these assumptions is detracted from by Officer Gray's testimony on cross-examination (J.A. 92) that he had no "definite information" concerning the origin or destination of the recovery vehicle. Contrary to respondent Hernandez-Loera's contention (Br. 5 n.5), we have never asserted that the officers had "information regarding 'the particular movements of the suspected pickup vehicle,'" but only that they were aware of facts "from which they were able *to deduce* a likely and very specific modus operandi in terms of * * * the particular movements of the suspected pickup vehicle" (U.S. Br. 15; emphasis added).

d. Respondents also challenge (Cortez Br. 6-8; Hernandez-Loera Br. 23-24) as arbitrarily underinclusive the officers' decision not to observe and stop sedans or commercial (linen company) vans that passed them heading west and again heading east within the estimated time span.[3] Since the officers did not make a specific record of such vehicles as they passed in a westward direction, there is no way of knowing whether any of them returned eastward during the period of observation (although given the time of night and the sparse population in the area, there can hardly have been many, if any, roundtrip

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had reached the highway is explicable only if the pickup vehicle were approaching from the east; were it coming from the west, the group would simply have waited by the highway for its arrival, rather than pointlessly walking away from the vehicle.

[3] Of course, respondents also challenge the standard employed by the officers on overinclusion grounds. In that connection, it is significant that no vehicle other than respondents' was stopped during the officers' almost five and one-half hour surveillance period (J.A. 102, 113). In any event, respondents' "overinclusion" argument is nothing more than a contention that the officers lacked founded suspicion, which we have answered in our opening brief (at 11-15).

travelers other than respondents during the period). In any event, the officers' decision to focus their attention upon the types of vehicles most likely to be employed for transporting groups of illegal aliens, far from being unreasonable, represents precisely the kind of rational assessment of the likelihood of criminal activity that the Fourth Amendment demands.[4]

e. Respondents imply (Cortez Br. 8; Hernandez-Loera Br. 8) something questionable from the fact that, as their vehicle passed the officers going west, Officer Gray was able to note the first four digits of its license plate number but was not able fully to describe the vehicle (J.A. 65-66), while Officer Evans, who was not as close to respondents' vehicle as it passed, was able to give a fuller description of the vehicle (J.A. 103-104, 108). As both officers testified (J.A. 65-66, 104), however, they had pre-arranged that Officer Gray would try to get the license plate number of any passing van, truck, or camper while Officer Evans would attempt to observe the vehicle itself, presumably in order to obtain the most information possible during the short time in which a vehicle passed by.

f. Respondent Cortez also attempts (Br. 7, 17, 23, 24-25) to attribute the officers' decision to station themselves at milepost 149, near the intersection of Highways 86 and 286, rather than at milepost 122, the expected pickup point, to the officers' "[having] no idea of [respondents'] vehicle's route" (see also Hernandez-Loera Br. 16-17). As Officer Gray testified (J.A. 61), however, the officers' "first commitment was to the Altar Valley," to which Highway

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[4] Officer Gray provided a reasoned explanation for the conclusion that sedans or linen trucks were less likely than vans or campers to be employed in Chevron's operation (see J.A. 79, 100).

286 leads (J.A. 61). Thus, by stationing themselves at the junction of Highways 86 and 286 the officers could both observe the east-west traffic on Highway 86, where they expected to find Chevron and his group (J.A. 60), and still cover their assigned beat (J.A. 61-62).[5]

2. Before this Court, both respondents attempt (Cortez Br. 10-11; Hernandez-Loera Br. 12-18) to characterize the stop of their vehicle as a search, presumably for the purpose of requiring of the government a showing more rigorous than that of founded suspicion. As the officers testified, however, no search of the vehicle took place until after the officers knew from the lifting of a curtain that the rear of the camper was occupied (J.A. 68-69)[6] and after respondent Cortez consented to the search.[7]

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[5] Officer Gray also testified (J.A. 62) that regulations required that both officers be together at all times, and that there was a shortage of manpower.

[6] Even if the facts known prior to the stop did not amount to probable cause, this additional information would, in our view, have supported a search even in the absence of consent.

[7] The testimony was in exact contradiction on the consent point. While Officer Gray testified (J.A. 70) that respondent Cortez opened the back door of his vehicle without being asked to do so, respondent testified (J.A. 122) that Officer Evans told him to open the camper. From the record of the suppression hearing (J.A. 14, 16, 71), it appears that the motion to suppress was directed to the validity of the stop of respondents' vehicle and not to the subsequent search thereof. In any event, since the district court denied the motion to suppress, either it must have believed Officer Gray's testimony, or the validity of the subsequent search of the vehicle must not have been properly before it. We further note that the existence or validity of respondent Cortez's consent to the search was not raised by respondents on their appeal. Therefore, that issue is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

Nonetheless, respondents rely (Cortez Br. 8, 10-11, 22; Hernandez-Loera Br. 7 & n.8, 12) on testimony indicative of an intent on the part of the officers to search the cars that they stopped. Whether they intended to search any vehicle that was stopped is questionable, however. The fact that Officer Gray answered in the affirmative leading questions concerning whether he would have searched the cars he stopped (J.A. 77-78) does not preclude the implication that he would have done so only if the initial stop had resulted in probable cause or consent to search, as happened in the present case. Indeed, when Officer Gray was given the opportunity to describe in his own words his intention in stopping respondents' vehicle, he testified (on cross-examination) as follows (J.A. 81):

> Q. You were stopping the vehicle, were you not, to search it?
>
> A. To establish alienage of the occupants, visible occupants.

In any event, an officer's subjective intent is irrelevant to a determination of the lawfulness of a search. See *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980), slip op. 12-14 (opinion of Stewart, J.); *Scott* v. *United States*, 436 U.S. 128, 137-138 (1978). Thus, in the present case, even if Officer Gray had an intent to search respondents' vehicle regardless of the existence of probable cause or consent, since that intent was never put into action, it does not raise the showing required of the government above that of founded suspicion.

3. Finally, respondents contend (Cortez Br. 12-13; Hernandez-Loera Br. 17-18) that the officers should have obtained "advance judicial approval for their decision to conduct searches on High-

ways 86 and 286 on the early morning of January 31st between the hours of 2:00 and 6:00 a.m." However, it is well settled that warrantless stops or searches of vehicles on the highway are permissible under the Fourth Amendment, provided the requisite founded suspicion or probable cause exists. We read Justice Powell's suggestion (*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 n.7 (1975); accord, *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 283-285 & nn.3, 4 (1973)) that warrants "could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens" as intended to address circumstances in which there exists neither founded suspicion nor probable cause, as those terms are normally used; we think it plainly is not directed to cases like the present one, in which clues from, and investigations of, past border crossings led by the same suspect resulted in the existence of founded suspicion, if not probable cause.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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